1092

No. 2958.

IN THE

CIRCUIT COURT OF APPEALS

OF THE

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UNITED STATES

Ninth Circuit.

UNITED STATES OF AMERICA, *Plaintiff and Respondent,* vs. SOUTHERN PACIFIC COMPANY, et al., *Defendants and Appellants.*	IN EQUITY.

APPELLANTS' BRIEF UPON THE FACTS.

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(I) The facts admitted or established beyond dispute show that from the earliest days the lands in suit were used only for grazing purposes, and that it was not until the discovery of oil in the Kern River field near Bakersfield in May, 1899, thirty miles to the east from the nearest lands in suit, that any attention was paid to the lands in suit as oil lands; that although these lands were thereupon plastered with so-called locations by speculators, none of them ever sunk a well or erected a derrick or discovered any oil upon any of the lands; that when the railroad company, four and a half years later, selected these lands under its grant from the United States, the government sent a special agent into the field who reported that, after a careful examination, he found no indications of oil or other mineral; that, thereupon, the government required the railroad company to publish notice of its application with a description of the land for eight weeks in a daily newspaper in that vicinity; that this was done and, there being no protest from anyone, a

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STATEMENT OF THE CASE

This is an appeal by the Southern Pacific Company, Southern Pacific Railroad Company and the other defendants, from a final decree entered August 9, 1915, by the United States District Court, Southern District of California, Northern Division, cancelling and annulling a patent issued by the United States on December 12, 1904, to the Southern Pacific Railroad Company for 6109.17

acres of land in *Township 30 South, Range 23 East,* M.D.M., California, as lands inuring to said railroad as indemnity under the act of Congress of July 27, 1866, and joint resolution of Congress of June 28, 1870.

The bill alleges in substance, that the defendant railroad company selected said land as non-mineral land and fraudulently concealed, from the Government, the mineral character of said land and fraudulently represented to the Government, in its application to select and in a non-mineral affidavit accompanying it, that said lands were not mineral lands and were of the character contemplated by the said grant; that, in fact, said lands contained rich and valuable deposits of mineral, all of which facts were then known to said railroad company; that said statements were made for the purpose of deceiving the Government and inducing the issuance of a patent for said lands; that the Government believed said statements and acted upon them and was induced, thereby, to issue the patent in question; that the Government was induced, thereby, to omit to make any examination, investigation or inquiry as to the true facts and as to the mineral or non-mineral character of said lands.

The answer of the Southern Pacific Railroad Company and of the other defendants puts in issue all material allegations of the bill. The answers admit and allege that these lands were duly and legally selected by the railroad company and were

regularly and legally patented to the railroad on December 12, 1904.

The evidence in this case is voluminous. The evidence was taken before a special examiner; hence, the judge of the District Court heard none of the witnesses personally and was obliged to base his decision upon the typewritten record of more than ten thousand pages. Upon this appeal this record has been reduced to a printed record of three thousand nine hundred and two pages. To anyone who had not personally participated in the trial, such a record might well seem so formidable as to preclude the hope that any review thereof would lead to any clear understanding of the controlling facts.

If, however, appellant's views are correct, the material facts in this case are not obscured by any conflict of testimony. Such facts are either undisputed or have been established by the uncontradicted evidence. When they have been made clear to this Court, the unimportance of the details as to which there is a conflict of opinion will, if appellant's views are correct, become apparent and the rules of law that should govern in the disposition of this case will likewise be obvious.

It is our purpose then to state at the outset the facts which the record shows are not disputed or have been clearly established by the testimony, particularly with reference to the situation as it existed at the time the patent here involved was applied for by the appellant Southern Pacific Rail-

road Company (November 14, 1903) and at the date of its issuance by the Government to the railroad company (December 12, 1904). If this patent was procured through fraud on the part of the railroad company, such fraud must have been practiced before the issuance of patent on December 12, 1904.

What happened after the patent issued is, of course, immaterial except in so far as it may tend to throw light upon the knowledge and intent of the parties prior to the issuance of the patent.

This brief deals primarily with the facts established by the evidence. The legal propositions involved will receive only incidental reference as they will be more extensively discussed in a separate brief entitled "Appellants' Points and Authorities".

I.

The facts admitted or established beyond dispute show that from the earliest days the lands in suit were used only for grazing purposes, and that it was not until the discovery of oil in the Kern River field near Bakersfield in May, 1899, thirty miles to the east of the nearest lands in suit, that any attention was paid to the lands in suit as oil lands; that although these lands were thereupon plastered with so-called locations by speculators, none of them ever sunk a well or erected a derrick or discovered any oil upon any of the lands; that when the railroad

company, four and a half years later, selected these lands under its grant from the United States, the government sent a special agent into the field who reported that, after a careful examination, he found no indications of oil or other mineral; that, thereupon, the government required the railroad company to publish notice of its application with a description of the land for eight weeks in a daily newspaper in that vicinity; that this was done and, there being no protest from anyone, a patent was issued to the railroad company; that at the time of the issuance of such patent no oil had been discovered upon any of the land patented, or any of the intervening sections, the nearest oil well at that time being at McKittrick, four miles west from the land in suit nearest thereto and ten miles away from some of it.

The patent covers about six thousand acres of land situated in certain odd-numbered sections in Township 30 South, Range 23 East, Mount Diablo Meridian, in a range of hills known as the Elk Hills, in Kern County, California. This range of low hills is about seventeen miles long and about six miles wide. These hills are separated from the Temblor Range by narrow valleys and small intervening ranges of hills, the most important of which are the Buena Vista Hills. The Elk Hills approach within a few miles of the Temblor Range at the westerly end but at the easterly end they

are about twelve miles away from the main range. That is, the Elk Hills are not strictly parallel to the Temblor Range.

The lands in suit are alternate odd-numbered sections of land lying within the indemnity limits of the grant made by act of Congress July 27, 1866, and joint resolution of June 28, 1870, pursuant to which the railroad company constructed the railroad contemplated by such grant and became entitled to the alternate odd-numbered sections of land within the limits of the grant as therein provided.

The McKittrick, Midway and Sunset oil fields, as now developed, lie along the base of the Temblor Range from four to fifteen miles south and west of the lands now sued for.

While a great deal of the surface of the Elk Hills is too broken for ordinary farming operations, it was shown by the evidence that they were valuable for grazing for both sheep and cattle and had been used for that purpose at least as far back as 1874. (Tr. 121, 191-2, 249, 265, 1982, 2112) At the time this suit was tried the railroad company had leased for grazing purposes about seventy thousand acres of grazing lands, including the lands in suit, for which it received an average rental of about four cents an acre. (Tr. 1697)

The nearest well to any of the lands in suit prior to the issuance of patent was at McKittrick, four miles away. (Plffs. Ex. O) This was put down in

1899, (Tr. 170) but the present oil development started in the Kern River field where the first well was brought in during May, 1899. (Tr. 495) This well was twenty-five or thirty miles from the nearest lands here in suit. (Tr. 141, Pl. Ex. O) During the ensuing excitement it appears that men in every walk of life, spurred on by dreams of sudden wealth and without knowledge of the habits of oil or the difficulties to be overcome in attaining it, rushed eagerly into schemes to locate lands anywhere in Kern County. Many of these, of course, made speculative locations of pretended oil claims in the Elk Hills beginning immediately after the discovery of oil in the Kern River field and continuing for a few years after that until the excitement had died down. A large number of these claims were filed in the office of the County Recorder of Kern County. Not one of them was entitled to record under any statute of this state and not one of them was an oil location because of the lack of any discovery. An analysis of these supposed locations shows that they were piled on top of each other three and four deep on portions of the land and that they were constantly being abandoned by one set of speculators and "relocated" by another set. The Government introduced the testimony of more than twenty witnesses showing that these locations had been made, yet not one of these witnesses could say that he knew there was a pint of oil in the Elk Hills. Not one of

them ever tried to drill for oil with the exception of the witness F. D. Lowe, who claimed that about 1901 he had drilled to a depth of 560 feet in the southeastern part of these hills, many miles from the lands in suit, where he had found a few drops of oil "strolling down" the drill when it was removed from the well. (Tr. 150) Even he and his associates abandoned this place. In 1910 a well was drilled near the location of the Lowe well to a depth of 4850 feet without finding the least trace of oil. (Tr. 1795)

The largest group of claims in the Elk Hills was that located by H. A. Blodget, N. C. Farnum and others. These people had at least fifty square miles under location in that vicinity. According to N. C. Farnum they located everything that was not patented in Townships 30-23, 30-24, 31-23 and 31-24. (Tr. 501) He said that they relocated these claims from time to time. When they made their original locations they employed twenty-five or thirty men to stake out their claims, says Farnum, "because there were several trying to do the same thing, and as a general proposition we got ours first. We saw to that." (Tr. 503) The witness W. G. Sylvester testified that he and several others started out from Bakersfield to make some locations beyond McKittrick during this excitement in 1899, but concluded to locate in the Elk Hills because they came to them first and thought that they would do just as well. (Tr. 359) He

was anxious to locate as many claims as possible but found that a man named Packard was also there. Packard had the advantage as his men were on horseback and, therefore, could run out the lines and set up notices much quicker than Sylvester could. Also, according to Sylvester, Packard had an unfair advantage as he had his notices already made out. (Tr. 356-7, 359.)

Sylvester was a dentist, Packard was the marshal of Bakersfield, Farnum was a brick maker, and practically all of the other locators of these speculative claims were men without experience in the oil business. (Tr. 257, 358-9) A few competent oil men were also probably carried along by the wave of enthusiasm, but, as a rule, they realized the uncertainties of untried territory and therefore confined their activities close to the main range, where prior development in certain localities had shown the presence of oil in commercial quantities. W. G. Sylvester testifies that during this excitement a great many competent oil men came into that country but that they did not go into the Elk Hills. (Tr. 360)

It is a common saying in a mining country that more money is to be made from the sale of "prospects" than can ever be taken out of the ground. This is particularly true in the oil business because of the readiness of the uninitiated to believe that oil may be found anywhere in the viciinty of certain supposed "indications" such as shale,

outcrops, "seepages", etc. We are therefore not surprised to find among these locators in the Elk Hills a number of men, such as Blodget, Farnum and others, who were obviously interested only in the possible sale of these speculative claims to outsiders.

Farnum testified that between 1900 and 1903 he arranged to have a great many people look over these claims in the Elk Hills and that he actually did succeed in getting a "man named Bartlett" to consider leasing some of these claims. This deal was not consummated, according to Farnum, because Bartlett learned of the withdrawal order. (Tr. 505) As the withdrawal order had no application to mineral claims, it is more probable that the deal fell through because of the unpromising character of the land. There could be no doubt that these energetic speculators did their best to unload some or all of their claims onto some of the many men who came into that country with more money than experience. Their uniform lack of success indicates that even the "tenderfeet" were unwilling to look at the Elk Hills.

H. A. Blodget was associated with wealthy men (Tr. 380) but he does not seem to have been able to interest any of them in the Elk Hills. He was himself a large operator but was too wise to spend his own money in sinking a test well. He did attempt to persuade R. K. Howk to put up the money for such a well but Howk declined after

looking at the land. Howk says that Blodget *may* have thought the oil sands extended beneath the Elk Hills, but, he significantly adds, Blodget "didn't put any money in it. He thought there was a possible chance. It was deep land." (Tr. 1864) Blodget himself admits that he directed his own operations toward *known* territory and that he then regarded the Elk Hills as totally *unknown.* (Tr. 395)

During the six years they held these claims, or a part of them, they spent $20,000 for location work and in other ways. They did the assessment work on perhaps a quarter of the claims, according to Farnum, and relocated them from time to time in the hope that they might be able to interest someone in leasing the land and developing it. (Tr. 521) He further says that they maintained possession by keeping a man or two on the ground. (Tr. 503) And Farnum also admits that during all this time there was no discovery made on any one of these "claims." (Tr. 514)

Blodget and his associates were apparently the only people who attempted to hold their claims for any length of time. It is not possible to here review all of the testimony concerning other similar locations. The interesting thing about them is that in practically every instance the locators contented themselves with putting up and recording their notices. They rarely went back again or made any effort to induce others to go in with them. Some

of them did make such an effort. W. G. Sylvester, for instance, tried to get someone to drill on the land but without success. He says, "I presume they considered it wildcatting to go in there." (Tr. 357) The Blodget and Farnum interests had more money and more claims than anyone else. They could, therefore, afford to hold on to their speculative venture longer.

The witness Farnum testifies to the expenditure of $20,000 on these claims and from other witnesses it appears that there was twice that amount spent in all in digging holes, making roads, erecting monuments and in doing various other things claimed to be either location or assessment work. The speculative and insincere character of these claims is shown by the fact that not one cent of this money was spent in an actual effort to develop oil. For more than ten years after these claims were first located not a derrick was erected or a drill stuck in the ground by any of these locators. *In fact none of these men ever did attempt to find oil in the Elk Hills.* The drilling which began there in 1910 was done by men who had no connection with these early locators or with their "locations."

The witness Farnum says that it was the "firm determination" (Tr. 511) of himself and associates to drill a test well in the Elk Hills. But their acts at that time belie this statement. They then had an available drilling rig near at hand and not in

use, which Farnum says they intended to move into these hills. (Tr. 503.) According to him the sole reason they did not do so was because the government had "withdrawn" the land in 1900. (Tr. 510, 520.) But, inasmuch as this government withdrawal affected only *agricultural* entries (Tr. 1558), it is apparent that their real reason for not drilling in the Elk Hills was something else. The withdrawal order did not prevent them from starting a well at that time on Section 26, Township 30-22, *close to McKittrick*, on land which they held under mineral locations, although it was a matter of official record that this Section 26 was within the same withdrawn area.

A. T. Lightner, a witness for the defense, testified that in 1903 he was engaged in the abstract business at Bakersfield and was associated with a man named Brown in making locations in the Elk Hills and elsewhere. Lightner looked up the records to discover vacant lands or claims on which the assessment work had not been done and Brown induced various persons to employ him to locate these lands for them for a small compensation. Many of these claims were located in the Elk Hills on ground which had lapsed because of the abandonment of earlier claims. Many people were induced to go into this mildly speculative venture. No work was done by any of them on these "locations" and it was Lightner's opinion that none of them had ever seen the land. (Tr. 1997-8) One of

the men whom Brown thus induced to lend his name was Timothy Spellacy, a prominent operator in the Midway Field, and in the court below counsel for the government endeavored to argue that Mr. Spellacy actually located these claims himself. The significant fact in this connection is that neither Spellacy nor any of the other practical oil men in that region did go into the Elk Hills.

Lightner frankly admitted that these claims were purely speculative and were located without any idea whether the lands contained oil or not.

There was, it is true, testimony to the effect that these locations were influenced by the existence of a "seepage" in Section 32 of Township 30-24, to the east of the lands in suit, and upon "asphalt indications" in the railroad cut at the west end of the hills. It will be later pointed out that neither one of these supposed "indications" has any connection with the oil in the Elk Hills. The alleged "seepage" is not a seepage at all and the asphalt found near the railroad cut is float washed down from the vicinity of McKittrick. But, however this may be, the entire history of these early locations is convincing evidence that not one of them was made in good faith. They were made simply in the hope that because of the excitement attendant upon the discovery of oil in the Kern River field, five miles away, the locators of these claims might be able to dispose of their so-called locations at

some profit and without any risk to themselves. Not a single discovery of oil was made by any of them. Not one of them ever tried to drill for oil with the exception, already stated, of the witness Lowe who claimed that he had drilled to a depth of 560 feet, many miles from the lands in suit, where he had found a few drops of oil on the drill when it was removed from the well. (Tr. 150) Even he and his associates abandoned this place.

The excitement attendant upon the discovery of oil in the Kern River field in May, 1899, attracted the attention of the Government. On February 28, 1900, the Commissioner of the General Land Office suspended from agricultural entry about nine hundred square miles of land in the vicinity of the California oil fields, including the lands in suit. (Exhibit QQQ Tr. 1524) They were suspended from agricultural entry "upon allegations that the same contained deposits of mineral (oil)" Tr. 1555)

Later in the same year the Department at Washington requested advice whether this general withdrawal order should be modified. In response to this request, Jay Cummings, a special agent of the General Land Office, made a confidential report, dated July 13, 1900. (Tr. 3868-77) It does not directly refer to the lands in the Elk Hills but does report on lands in the township where McKittrick is situated. It contains an enthusiastic and even extravagant description of the oil possibilities of the

entire southern end of the San Joaquin Valley, saying that petroleum might be expected to be found in "fabulous quantities" within the withdrawn lands.

It is quite probable that other subsequent reports of the same character were made by Cummings. He states in the report that it is his intention to make other reports. S. P. Wible testifies that Cummings was in and out of McKittrick for three or four years and that as a result of his reports the withdrawal was canceled as to some of the land in 1902 or 1903. (Tr. 331)

On November 14, 1903, C. W. Eberlein, who had become the acting Land Agent of the Southern Pacific Railroad Company a few months earlier, filed a selection list or application for the lands now in suit. This was more than four years after Farnum and others had made the so-called locations already mentioned. These lands had been surveyed in the preceding year (Tr. 107) but the plat of this survey was not filed in the local land office until May 16, 1903. (Tr. 3761) Accompanying this selection list was an affidavit by Eberlein, dated November 7, 1903, in which he stated that these lands were "not interdicted mineral or reserved lands, and are of the character contemplated by the grant", and that he had "caused the lands selected * * * * to be carefully examined by the agents and employees of said company as to their mineral or agricultural character and that to

the best of his knowledge and belief none of the lands returned in said list are mineral lands." (Tr. 3754) Eberlein testified that he made this affidavit on information furnished him by his assistant George A. Stone, who was a land grader for the company who had been in its employ for many years, and who told Eberlein that he was familiar with the lands. (Tr. 1137) Stone testified that he was familiar with these lands from having been frequently in that country for two years preceding the selection, although he did not make a special examination for the purposes of this selection. (Tr. 1029) The affidavit of Eberlein follows the form prescribed by the Government itself in the Regulations of July 9, 1894. (19 L. D. 21)

This selection list was promptly rejected by the Government because the lands were within the withdrawal of February 28, 1900. (Tr. 1159-60)

An appeal was at once taken by the railroad company from the rejection of this list. (Tr. 3865) In the letter of the law department of the railroad company of December 9, 1903, notifying Eberlein that the appeal had been taken, it was suggested that a *hearing* might be had before the local land office to determine the character of this land. This indicates that there was nothing to conceal so far as the railroad company was concerned. But it seems that prior to that time the Government had inaugurated the system of having specific tracts of land examined by its own agents

to determine whether they contained oil or not, in place of a hearing. This appears from the letter of D. A. Chambers, Washington attorney for the railroad company, to Wm. F. Herrin, dated December 16, 1903. (Tr. 1483) Such examinations were not made particularly for the railroad company but seemed to be generally made whenever any sort of an agricultural patent was applied for within the withdrawn area. (See letter, Commissioner Richards to Register and Receiver, August 18, 1903) (Tr. 1513)

Because of this system of special examination by its own agents which the Government had established, D. A. Chambers, as attorney for the railroad company, on November 30, 1903, wrote the Commissioner of the General Land Office requesting that such an examination be made of the lands now in suit, (Tr. 1544) and on December 10, 1903, he was advised by the Commissioner that a special agent had been instructed to examine and report on them. (Tr. 1482)

The direction to examine these lands was sent to E. C. Ryan, a special agent of the General Land Office, a son of the Assistant Secretary of the Interior and subsequently Chief of the Field Division of the General Land Office at Los Angeles. As shown by official correspondence in evidence, Ryan had made a number of other similar examinations prior to that time but not relating to the lands in suit. The letters directing the examination of the

lands now in question were dated October 23, 1903, and December 10, 1903. In the first letter, which describes only a portion of these lands, the Commissioner said: "It is alleged by the railroad company that the tracts above described are in fact non-mineral in character. You are, therefore, directed, in the regular order of business, to proceed and examine the lands in question and thereafter submit report to this office, stating whether or not, in your opinion, the same should be relieved from suspension." (Tr. 1542-3) The second letter directed a similar examination of lands not included in the first letter and requested a special examination and report on them, together with those described in the first letter. This second letter also spoke of a more general examination remaining to be made of all the lands then under suspension. (Tr. 1547)

On January 22, 1904, E. C. Ryan reported to the Commissioner on this special examination, saying: "I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and I respectfully recommend that they be relieved from suspension." (Tr. 1550) A part of the lands referred to in this report are not involved in this suit, but the

evidence shows that not more than two days were devoted to the examination of these outside lands. (Tr. 1970)

When this report was received in the Land Office, it was endorsed, "Report as to the mineral (oil) character of certain lands" etc. (Tr. 1551) This shows that it was considered to be a determination of the character of these lands, at least so far as the opinion of the government's own agent was concerned. It received official recognition as being such a determination by the letter and order of the Commissioner of the General Land Office to the local land office at Visalia, dated February 11, 1904, in which this statement is made:

> "I am now in receipt of a report from a Special Agent of this office who has examined * * * * * (describing the lands), and who states that a careful examination thereof failed to disclose any oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend to warrant the lands being classed as mineral. He recommends that the same be relieved from suspension. The statements made in the Special Agent's report are not controverted by the records of this office and it would appear that during the period of nearly four years which has elapsed since said suspension, any persons interested in the mineral development of the lands have had ample opportunity to explore and develop the same." (Tr. 1556)

This letter concluded with a formal order relieving the lands from suspension. Another letter, dated February 20, 1904, returned the rejected selection list with the statement "that said application to select may now be granted, if no other objection thereto exists." (Tr. 1557) This was a definite statement that the mineral question was considered closed. These letters were public documents open to anyone. They were intended to be an official declaration and determination that the lands in question were not oil lands and that they were open to selection by the railroad company under its grant. Whether or not Ryan was a competent observer of the character of these lands is immaterial. The Government selected him, trusted him to make the examination, relied on his report when he said that these lands were not oil lands, and officially declared to the world its acceptance and adoption of his conclusion.

When the order of the Commissioner of the Land Office relieving these lands from suspension on the ground that they had been found, after a *careful* examination, not to be oil lands, was filed in the local land office, it came to the attention of the railroad company. Eberlein testified that he never saw Ryan or had any communication with him and that, as far as he knew, Ryan was in no way influenced by anyone connected with the railroad. He testified further that after he learned of the lifting of the suspension order, he knew that the Government

had itself actually investigated the character of this land and felt that its action had "backed up the non-mineral character of that land entirely." (Tr. 1162-3)

On February 26, 1904, acting under the directions received from the Commissioner, the local land officers regularly filed the selection list. (Tr. 3767) As some of the selected lands were within six miles of a known mining claim as shown by the records of the General Land Office, the railroad company was required to publish notice of its application for patent. (Tr. 3860-1) This notice was published in fifty-two successive issues of the Bakersfield Morning Echo, beginning on April 14, 1904. (Tr. 3859) This notice specifically described the lands applied for and called for protests against the application by anyone who thought that the lands were mineral. (Tr. 3860) The Morning Echo was a paper of general circulation in Kern County at that time and it is a very significant fact that no protests were filed against this selection by any one of the numerous speculative locators, who had claims on these lands, althougn a number of them admitted that they subscribed to and read this paper at that time. (Tr. 407)

Subsequent to the completion of this advertisement, some questions were raised in the General Land Office concerning the proper technical description of some of the selected lands, and also as to the sufficiency of some of the base lands in

lieu of which the lands in suit were being selected as indemnity. These were purely formal matters not in any way concerning the question of the character of the land. (Tr. 3771) In order to meet the objections raised by the Government to the form of the selection list, an amended or "re-arranged" list was filed on September 6, 1904. (Tr. 3772) Attached to this list was an affidavit, sworn to by Eberlein, of August 31, 1904, identical with the non-mineral affidavit attached to the original list filed by him the preceding November. (Tr. 3850) Another identical affidavit, sworn to by Eberlein on June 20, 1904, was also introduced in evidence from the files of the General Land Office, but without any explanation of a reason for its existence. It is probable that it was filed in supposed compliance with the Regulations of July 9, 1894, concerning advertising of selection lists, as it was made immediately after the conclusion of the publication in the Bakersfield Echo.

On December 12, 1904, the Government issued its patent to the Southern Pacific Railroad Company. This patent was duly recorded in the County Recorder's office of Kern County.

At the time of the issuance of this patent no oil wells had been sunk, or any oil discovered upon any of the lands in suit, or any of the intervening lands. The nearest oil well was four miles away.

Suit to cancel this patent was filed by the Government December 10, 1910, six years after the issuance of the patent.

The foregoing statement of the case is based upon facts that have been either admitted or clearly established by the testimony. There is no conflict of the testimony as to any of the facts in question, except that the Government sought to prove by some witnesses that the land had no value for grazing or agriculture; but the testimony of six other witnesses, including three Government witnesses, clearly shows that the land was actually used for grazing purposes. It is well to pause here and summarize these facts, even at the risk of undue repetition, in order that their significance and controlling importance may not be overlooked or forgotten. It is all the more important that we do this because when we come to consider the circumstances relied upon by the Government we will find ourselves in a realm of conjecture and suspicion clouded with conflicting geological theories and distorted inferences drawn from facts which, in themselves, are perfectly innocent—a realm where every fact consistent with the good faith of those engaged in the issuance of this patent, both on the part of the Government and the railroad company, is either totally ignored or sought to be obscured by innuendo, or by the direct charge of fraud supported only by inference and suspicion.

It is, however, a well established rule that "evidence of whatever description must yield to the extent that it conflicts with the admitted or clearly established facts" (*Moore on Facts, sec.* 7) and the facts that are admitted or have been established beyond peradventure by the evidence in this case show that from the very earliest days the lands here in suit were used only for the grazing of sheep and cattle up to May, 1899; that during all this time they remained in the undisturbed possession of cattle and sheep men, and they so remained until the discovery of oil in the Kern River field in May, 1899; that such discovery was thirty miles from the lands here in suit; that the swarm of speculators who thereupon spread out over all the adjoining territory, plastering the country as they went with their paper locations, included the Elk Hills in their operations but that none of them ever sunk a well, or erected a derrick, or discovered a pint of oil in any of these lands although four years elapsed from the time that they began making their locations before patent was issued to the railroad company; that the Government had withdrawn these lands from entry when the railroad company made its application for patent; that this withdrawal was because of the possibility of oil being found therein; that the Government was as fully advised as to the character of the land at the time the railroad company applied for patent as the company itself, if not more so; and that it refused

to entertain the company's application for patent until it had made a special examination of the lands for the purpose of ascertaining the character of the land; that upon receipt of the report of its agent stating that he had made a careful examination of the lands and found no indications of oil or mineral of any kind that would, in his opinion, warrant the lands being classed as mineral, the Government relieved the lands from the withdrawal order, permitted the company's application to be filed and ordered the notice of such application to be published in fifty-two successive issues of a newspaper published and of general circulation in the vicinity of the land; that this notice, which was published as required, contained a specific description of the land and called for protests against the application by any one who thought that the lands were mineral; that no protests were filed by anyone; and that thereupon, in due course, the patent was issued; that at the time this patent was issued not an oil well had been sunk, or a derrick erected, or any oil discovered, upon a single acre of the land conveyed by the patent, or upon any of the intervening sections; that the nearest oil well then in existence was four miles distant from the nearest land embraced in the patent and ten miles distant from some of it.

The evidence as to the so-called oil locations which were put upon this land immediately after the discovery of oil in the Kern River field was

introduced by the Government. Rightly considered, however, the fact that none of these locators ever sunk or attempted to sink a single well upon any of the lands embraced in such locations, although they had more than four years to do such work before patent was issued to the railroad company, is one of the strongest facts that could be advanced to show that these locators not only did not know that the lands were oil lands but did not believe that they were oil lands. If there had been such belief it is evident that many wells would have been sunk upon these lands within a very short time. This is, indeed, one of the reasons given by the Commissioner of the General Land Office for relieving the lands from suspension. (Tr. 1556)

Yet, we find the Government asserting in its bill of complaint in this case that at the time the railroad company selected this land it fraudulently represented to the Government that the said lands were not mineral lands but were of the character contemplated by the grant; that, in fact, said lands contained rich and valuable deposits of mineral, all of which facts were then known to the railroad company; that said statements were made for the purpose of deceiving the Government and that the Government believed said statements and acted upon them and was induced thereby to issue the patent in question without making any examination, investigation or inquiry as to the true facts

and as to the mineral or non-mineral character of said lands.

When it is remembered that these allegations were made in the face of the admitted facts that the land had been withdrawn from agricultural entry by the Government itself because of its supposed mineral character; that the Government had as much knowledge as to the character of such lands as the railroad company, if not more; that it refused to entertain the railroad's application for patent until it had sent its own special agent in the field to make an examination of such lands and that the patent was issued only after such examination and a favorable report had been made thereon, and after publication of notice of the application and due opportunity given to everyone to protest, it must be evident that the Government's bill was either drafted by counsel entirely unfamiliar with the facts or by someone who had the same point of view as that of Royer-Collard, the French statesman, who boasted of his contempt for facts.

That this latter supposition is correct is, we think, made apparent by the fact that in the argument of this case in the District Court, counsel for the Government insisted that "the Government did not in any way rely upon Mr. Ryan's report as to the character of the lands he examined," but relied upon the non-mineral affidavit of Eberlein!

The burden, of course, rested upon the Government to establish by clear and convincing testimony, first, that the land was in fact valuable for oil at the time of the issuance of the patent; second, that this was known to the railroad company at the time it applied for patent and that Eberlein's non-mineral affidavit was false; and third, that the Government relied upon such affidavit and was deceived thereby.

II.

While there was a conflict of opinion between the geologists as to the oil possibilities of the Elk Hills, and while the geologists for the Government testified that any expert geologist examining the Elk Hills in 1903 should have known that they contained oil, there was no conflict of opinion upon the fact that it could not be determined at that time, or at any other time, without actual drilling, whether the oil was in sufficient quantity to justify drilling.

In order to establish its claim that the land was in fact valuable for oil and that such fact was known to the railroad company at the time it applied for patent, notwithstanding the absence of any oil discoveries upon or anywhere near the land in suit, the Government introduced the testimony of Arthur C. Veatch, a Government geological expert, and John Casper Branner, a professor of geology at Stanford University.

Mr. Veatch testified that, in his opinion, the Elk Hills were oil land (Tr. 701) and he thought that the oil value of the lands not yet drilled could be demonstrated in the same way that coal can be demonstrated, by the outcrops. (Tr. 701) Mr. Veatch drew an analogy in the mode of study of stratified beds in the case of oil deposits with that of coal. His theory was that the exposures of asphaltum, seepages and oil sands along the Temblor Range for a distance of thirty miles indicated the presence of a broad deposit of oil which would extend half that distance, or fifteen miles, at right angles to the Temblor Range. (Tr. 701-719.) He also stated that if this line of outcrops had been only five miles long he would have fixed the limit of oil territory at a distance of only two and one-half miles. (Tr. 808)

The Temblor Range, it should be borne in mind, is separated from the Elk Hills by narrow valleys and small intervening ranges of hills, the most important of which are the Buena Vista Hills. The Elk Hills approach within a few miles of the Temblor Range, but at the easterly end they are about twelve miles away from the main range.

This theory of Mr. Veatch was, without doubt, constructed for the purpose of endeavoring to bring this case within the ruling in the Diamond Coal case which had been decided in the Circuit Court of Appeals at that time (191 *Fed.* 786) and which was later affirmed by the U. S. Supreme Court

(233 *U. S.* 236). In this case it was held that the true character of certain alleged coal lands could be determined by the topographic and structural features of adjoining land in which coal was known to be located, regardless of the absence of any physical exposures at the surface upon the lands there in suit. The land there in controversy paralleled the outcrop of the coal for seven miles, the outcrop at the nearest points being only two feet away, the farthest section being about a mile and a half away. Mr. Veatch admitted that he knew of no other geologist who had suggested the application of any such theory to oil formations. (Tr. 810-11)

Professor Branner testified that he had examined the Elk Hills and that his opinion was that the Elk Hills "was the most promising area for petroleum in that region in the vicinity of McKittrick." He formed the opinion that it was oil bearing; (Tr. 1003) but did not think there was any way to determine, from an examination of the surface, how large an area would yield oil at any particular point. (Tr. 1018) He did not regard it as ordinarily possible for a geologist or practical oil man to determine, from the existence of an oil bed at a particular point, that the bed continues for any particular or definite distance in all directions or any direction, partly because the oil comes to an end where it rests on the water; partly because the porous beds are not infrequently

more or less lenticular in form; that is, they may pinch out and come to an end of themselves in that way, by thinning down, or they may be interrupted by breaks so that the beds may be chopped square off. (Tr. 1021-22)

Mr. Ochsner, a witness for the defendants, also criticised the Veatch theory on the ground that it took into consideration only part of the geological story and said that an assumption that because oil is distributed over a number of miles in one direction it must necessarily be found for a number of miles in another direction, was "exceedingly unwise" and, if followed by drilling, might be disastrous. (Tr. 2191-2) Mr. Taff, also a witness for the defendants, declined to accept the theory and objected to it, particularly, because it failed to take into account the peculiar character of the McKittrick anticline (with the accompanying deep syncline between there and the Elk Hills) and disregarded also the fact that the Elk Hills are a more recent uplift. (Tr. 2758-2777-2779)

Mr. F. M. Anderson, another geologist of great experience, and a witness for the defendants, said that there was no warrant for the assumption that oil could be found at a distance of even a tenth of its line of outcrop, as its existence at any place depended upon many other factors besides seepages. (Tr. 2546) As a result of more than ten years' active experience in the study of oil formations in

the California fields, he stated that it was not possible for any geologist, no matter how well qualified, to decide the oil-bearing character of land on the basis of structure alone. (Tr. 2547) A geologist may infer the existence of oil, but the only way to actually determine that it exists, he said, is by drilling. (Tr. 2548-9) This witness frankly admitted that the chief value of a geologist in an undeveloped district is to point out places where oil may *not* be found. (Tr. 2621-2)

Mr. Veatch, however, testified that he would not guarantee to any man going into the Elk Hills that he would get commercial wells. (Tr. 820, 825, 883) He said that while he believed there was a large quantity of oil in the Elk Hills, it could not, in 1904, have been mined at a profit and that the existence of oil in commercial quantities could not be proven without drilling. (Tr. 902)

Professor Branner also testified that in passing upon the character of the Elk Hills he did not determine in any way the quantity of oil and made no attempt to do so. That could only be determined by putting down wells. (Tr. 1007, 1016, 1020)

Mr. F. M. Anderson further testified that he had made many visits into the Elk Hills and vicinity, his first sight of the Elk Hills being early in March, 1903. (Tr. 2381) He details at great length his views as to the geological formation of that territory. His opinion in 1903 and 1904, as the result of his work and examination in that

territory, was that the likelihood of the Elk Hills being then, or ever being, oil territory was negative. (Tr. 2388) He did not believe that they were oil bearing or ever would be found to be oil bearing, at least not in paying quantities. He did not believe those hills contained any commercial deposits of oil at that time and did not so believe at any time later. (Tr. 2388-2454) Mr. Anderson entered the geological department of the Kern Trading and Oil Company in April, 1903. (Tr. 2399) He was in the employ of the land department of the Central Pacific Railway Company for a year or more prior to that time (Tr. 2374); but had left the service of the defendants a year and a half prior to the time the case was tried (Tr. 2585)

Mr. W. H. Ochsner, a consulting geologist, was employed by the Kern Trading & Oil Company, a subsidiary corporation of the Southern Pacific Company, and in 1907 devoted a good deal of work to studying the McKittrick district. (Tr. 2170) His work in that district covered the Elk Hills. He was engaged in working out the geology of the McKittrick field and the relation of the Elk Hills and Buena Vista Hills and the neighboring structures and topography came in as a natural sequence in that study. (Tr. 2171) From the examination he carried on in 1907 he concluded "that the Elk Hills may have small scattering amounts of oil but that they would not be important from an economic sense." (Tr. 2174)

Mr. J. A. Taff, who was also a geologist formerly in the employ of the Government but in the service of the Southern Pacific Company as an assistant geologist and geographist in connection with oil chiefly, (Tr. 2750) began geological work in the McKittrick field in December, 1909, and made a geological examination of the Elk Hills in October and December, 1912, and January, 1913. He made a study to determine for his own satisfaction whether or not the land embraced within the Elk Hills could be called oil land, and concluded that it could not be considered profitable oil land. (Tr. 2751) He gives, as do other witnesses for the defense, at great length, the reasons for his conclusions, which space will not permit us to repeat here.

While there was a conflict of opinion as to the oil possibilities of the Elk Hills, and while the geologists for the Government testified that an expert geologist examining the Elk Hills in 1903 should have known that they contained oil, there was no conflict of opinion upon the fact that, without actual drilling, the quantity of oil to be obtained could not be determined in 1903, or at any other time. All the witnesses are agreed upon this. It should also be noted in this connection that Mr. Veatch's theory that the discovery of an oil bed at a particular point would enable such oil to be traced like coal deposits and its locality elsewhere ascertained, even though there were no surface

indications and even though the distance may be as great as fifteen miles from the locality where it is known, is not only contradicted by every geologist called by the defense but is also contradicted by Professor Branner, who was the only other geologist called by the Government; hence, the preponderance of the evidence upon this point is clearly with the defendants and does not support the finding of the trial court which adopted Mr. Veatch's theory in this respect. Aside from this, however, and assuming that Mr. Veatch's testimony was substantially correct in all respects, it falls far short, for the reasons already stated, of sustaining the Government's contention that the lands in suit were *known* to be *valuable* for oil at the time patent was issued.

The fact is that the most that any geologist can do in passing upon undeveloped territory is to determine whether the structural formation and position of the land is *suitable* for the accumulation of oil. An anticline can be recognized as having the external characteristics of a good reservoir for the accumulation of oil, but there may not be a drop of oil in it. This may be because of any one of a hundred reasons, none of which may be apparent until wells are drilled into the anticline. An anticline, in short, has the same relation to oil that a bucket has to water. The bucket may be empty or filled with something other than water; or, to change the simile slightly, a rain barrel may ac-

cumulate rain water, but there may be no rain, or its access to the barrel may be prevented in many ways. As was said by Professor Branner, one of the government's geologists in this case, the formation of the Elk Hills was, in his opinion, suitable for the accumulation of oil "but that would not necessarily mean that they had accumulated oil. That could be determined only by exploration." (Tr. 1016) And this was the view of Mr. Veatch, the only other geologist called by the Government, who also testified that "oil cannot be proven in commercial quantities without drilling." (Tr. 902)

Taking then, the most favorable view that may be fairly given to the Government's evidence on this point, and disregarding entirely that introduced by the defense, the most that can be said is that a geologist examining the lands at the time the patent was issued would have concluded that they might contain oil, but could have done nothing but guess as to whether they contained sufficient oil to justify the expense of drilling. The entire matter was tersely but accurately stated by Frank Barrett, an oil land prospector, driller and producer, who was also a government witness, when he said that "the true expert is the drill." (Tr. 485.)

May it not then be justly said that even from the government's testimony thus far discussed, the question as to whether the land in suit was *known*

to be *valuable* for oil at the time the patent was issued should be answered in the negative?

III.

There was no testimony introduced by the government showing that, at the time the patent issued, the lands in suit were known to contain oil in such quantity and at such depth as would render its extraction profitable and justify expenditures to that end, within the rule announced in Diamond Coal Co. v. United States, 233 U. S. 236.

The Supreme Court, in the case of *Diamond Coal Co.* v. *United States*, 233 *U. S.* 236, took occasion to restate the rule, often laid down before, that an agricultural patent can be canceled on the ground that the land is mineral only by showing by clear and convincing evidence that it was known to contain valuable mineral deposits at the time the proofs were made upon which the patent was issued.

But it is now asserted by counsel for the government that the *Diamond Coal* case has established a new rule to the effect that mere *belief* in the existence of the mineral in the land is enough, regardless of whether or not such mineral exists in *fact*. But a fair consideration of the entire opinion does not support this contention. It was not necessary to the decision of the matter before it that the Supreme Court should change existing rules and the opinion contains no intimation that

any change was intended. The question before it was whether or not the evidence showed that there was *in fact* a valuable deposit of coal known to exist in the lands sued for at the time they were patented. This is shown by the express language of the opinion itself. "We think the evidence, rightly considered," says the court at page 247 of its opinion, "shows with the requisite certainty that at the time of the proceedings in the land office the lands were *known* to be valuable for coal. * * * * * * The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands." (Italics ours)

The present contention of counsel for the government is based upon a portion of the language used by the Supreme Court in the above case on page 239 of its opinion, where the court, in laying down certain propositions of law based on its own prior decisions, says:

> "To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the lands contained mineral deposits of such quality and in such quantity as would render their extrac-

> tion profitable and justify expenditures to that end."

It is obvious from the rest of the opinion that the word "belief" as here used is synonymous with the word *conviction.* It is not used to indicate a mere speculative impression that mineral probably exists. A belief that mineral *may* exist in land, although possibly sufficient to induce a prudent man to prospect the land, is far different from a belief that mineral *does* exist in the land. The Supreme Court, in the quotation given above, was speaking of the latter sort of belief and not of the former, as is shown in the concluding paragraph of its opinion, where it says by way of caution:

> "It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."

All that the *Diamond Coal* case does in fact decide is that the existence of mineral, as a real thing and not as a speculative possibility, may be proven by evidence of conditions outside the lands sued for, provided the circumstances are so peculiar that such evidence does not leave the matter in doubt.

Belief in the possibility or even probability of mineral deposits being in the land sued for is not

enough. Nor can belief alone (not based on the reality of mineral in the land) justify the cancellation of a railroad patent for the obvious reason that the government is not entitled to equitable relief unless it has in *fact* suffered *damage* by losing something which it was entitled to retain. By the grant of July 27, 1866, Congress gave all odd numbered non-mineral sections within certain limits. Such lands, that is, those which are actually not mineral in character, legally and equitably belong to the railroad company. If a section of such non-mineral land should be erroneously *believed* to be valuable for minerals and for that reason should be restored to the Government by court decree, it would be the duty of the Government to at once re-patent it to the railroad company upon the true situation becoming known. It is therefore the duty of the court, in such a case, to determine whether or not land thus sued for was in fact mineral in character and known to be such at the date it was patented.

It is apparently conceded by counsel for the Government that in 1904 it was not known *as a fact* that valuable deposits of oil existed in the lands now sued for. By what we conceive to be a complete misapplication of the language of the Supreme Court they now claim that the *Diamond Coal* case is authority for holding that belief in the probability of oil deposits in the lands sued for is legally

equivalent to knowledge of the actual existence of such deposits.

But even if we accept their interpretation of the language of the *Diamond Coal* case for the purposes of this argument, they have still fallen far short of making out a case since the facts which they have proven or sought to prove do not show even a belief conforming either in character or extent to that prescribed in the case referred to. It is to be remembered that the Supreme Court, in the portion of the opinion upon which government counsel now rely, stated that this belief must have reference to the quality and to the quantity of the mineral and to whether or not *at the date of the patent* the quantity of the mineral and other conditions affecting it were such as to render its extraction profitable. As we shall now point out, these essential elements are not comprehended within the belief of mineral sought to be proven in the present case.

It is, of course, evident that the belief, or even the fact, that land contains oil is not in itself sufficient to render such land valuable for oil. The depth at which the oil is located and its quantity are equally vital. Even where the oil exists in large quantities, the overlying strata may be so thick as to preclude any hope of its profitable development.

The evidence shows that a well four thousand feet deep, even now, is not a profitable venture unless it turns out to be a tremendously big pro-

ducer. (Tr. 2072.) A well in the McKittrick District 3600 feet in depth would have cost $60,000 and would have required ten years to pay for itself if it produced continuously one hundred barrels a day at the prices prevailing in 1904. (Tr. 2511.) The average commercial life of a well is five years. (Tr. 2504.) In 1903 and 1904, with the conditions and appliances then known, it was not considered to be a practical matter to drill to a greater depth than 2500 feet, the rotary method of drilling not having been introduced in California at that time. (Tr. 473, 2457-8.)

Realizing the necessity of showing that the *known conditions* of the lands in suit in 1904 were plainly such as to bring them within the requirements of the rule in the *Diamond Coal* case, as interpreted by them, and that the mere fact that oil might be found in these lands was not sufficient, counsel for the government asked their expert geologist, Mr. Veatch, whether, after taking into consideration the state of development of this region before September, 1904, including seepages which certain witnesses had testified to, and the geological structure of the region thereabouts, he, Mr. Veatch, would have advised a company employing him to sell the lands in suit for their agricultural value, and if not, why not. To which Mr. Veatch replied "Certainly not. For the reason of the great oil value of the land. The mineral value is greatly in excess of any agricultural value." (Tr. 716-17)

"Q.—And if your employer were not the owner of the lands in suit, would you, in 1904, with the then present stage of development, and without any exposure of oil seepage or outcroppings in the lands in suit, have advised the acquisition of these lands at a price in excess of their agricultural value? A.—Certainly." (Tr. 718)

It is apparent that the answer to the first question does not establish the conclusion that any one would be willing to expend any substantial sum of money in developing the oil upon the land, or that Mr. Veatch would have so advised. The testimony of the witness may be literally true in that he, or the owner of the land, might not have been willing to sell the land for its agricultural value, which was, of course, very small, and would have retained it in the hope that because of its oil possibilities he could eventually sell it for more than its agricultural value, and yet not have been willing to spend a dollar of his own money in its development. Likewise, the answer to the second question is equally consistent with the same idea. A great many people would be willing to purchase the land at a price slightly, or even considerably, in excess of its agricultural value, as a speculation, and without the slightest conviction or belief on their part that the land was really valuable oil land.

What counsel should have included in his hypothetical question, and which was carefully omitted therefrom, was the element of expense involved

in extracting the oil. This would in turn have involved the question as to the depth at which the oil was located, and when we come to the cross examination of Mr. Veatch the reason why this was omitted is apparent. Upon cross examination he testified as follows:

"Q. In your opinion then—I am now asking for your belief—there is a large quantity of oil under the Elk Hills?

A. I believe so.

Q. And at what depth?

A. I should say it may be under five thousand feet or it may be over.

Q. In 1904 could it have been mined at a profit?

A. No.

Q. Would it have been mined in 1904?

A. No. But there are a great many valuable mineral deposits that can not be mined at a given moment that are perfectly good mineral lands. * * * * I believe the Elk Hills will ultimately be developed into good oil lands.

Q. When?

A. Ultimately." (Tr. 885-6)

The witness would not, however, hazard any prediction as to when that period would be. It was possible, he said, that it might be within the next ten years. It was possible it might not be for twenty years. When asked if it would be within

the next hundred years he replied, "I think that is very remote." "Q. That is, you think it is safe to say that somewhere in the next hundred years the Elk Hills will be developed? A. Yes; I think they will be developed before a great many coal deposits in the middle west." (Tr. 887-8)

Later this witness also testified:

> "Q. By Mr. Lewers—You testified, did you not, that in your opinion whatever oil there might be in the Elk Hills might possibly be four or five or even six thousand feet deep?
>
> A. Yes; that is possible.
>
> Q. And might be even deeper?
>
> A. Yes; there are, I think, some deeper layers.
>
> Q. And in passing upon its value as oil land, on account, possibly, of such great depth, you took into consideration the chances that in the next twenty or fifty or more years means might be found for getting the oil at those depths?
>
> A. I think as a matter of fact means exist now. This depth limit to 5000 feet was fixed before there were wells in California of that depth then. * * * * * Now, in the next twenty years I think it is reasonable to think this land will be developed. I would put it much less than fifty years.
>
> Q. You answered the other day that it might not come within fifty years, but it might come in a hundred years.
>
> A. I should say that that is the outside limit. I think the chances of it coming in

twenty years are much greater than its coming at a time longer than fifty years." (Tr. 967-8)

Now it is obvious from this witness's testimony that he could not, or would not, hazard even a prediction as to one of the conditions most essential to a determination of the question as to whether expenditures in developing the oil would be justified; namely, the depth at which the oil was located. That he was of the opinion that it was at such a depth that it could not be mined at the time patent was issued is, however, apparent. The most he could say was that he believed that it might be mined at some very indefinite period in the future. That even this was a mere surmise based upon nothing tangible is shown by his inability, or unwillingness, to even speculate as to the depth of the oil. Is it conceivable that an investor would feel justified in expending large sums of money upon the report of a geologist to the effect that he believed there was a large quantity of oil in certain territory; that it might possibly be four or five or even six thousand feet deep or even deeper; that it could not be mined now, but that it was safe to say that it could be developed within the next hundred years; that the chances of its coming in twenty years were much greater than its coming at a time longer than fifty years? Does evidence of this character establish the known conditions that would plainly en-

gender a belief that would justify such expenditures within the rule which counsel for the government claim was laid down in the *Diamond Coal Company* case? Is it evidence that would support a finding in a court of law that the land containing such oil was known to be valuable therefor at a time when the oil could not be mined at a profit and the time when it could be so mined could not be foretold? Is it evidence of that clear and convincing character necessary to set aside a patent of the United States? We submit it is not.

It is the condition that exists at the time the patent is issued that must govern. No one can foretell what the future may bring forth. "The inquiry must be directed to the situation at that time." (*Diamond Coal Co.* v. *U. S.*, 233 *U. S.* 236) The "lands must be known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards, rich deposits of mineral may be discovered" (*id*). But if Mr. Veatch's theory is correct, the patent in this case should be annulled, not because the land had any value as oil land at the time the patent was issued, but because it may become valuable some time between twenty and a hundred years hence. If such a possibility should be considered, then, as was said by the Court in *U. S.* v. *Kostelak*, 207 *Fed.* 447, "Congress should legislate to that end."

The utmost that Professor Branner, the only other geological witness for the Government, could be induced to say in this connection on behalf of the Government was that if he went back to the conditions as they existed there before any wells were put down in either the Buena Vista or the Elk Hills, and he had been consulting geologist of those who anticipated putting down such wells, he would have put it to them in this way: "If you have got money to risk and you can afford to lose it, put it in there; if you cannot afford to take any risks, you had better let somebody else do it." (Tr. 1025.) * * * "Perhaps I ought to say that one of the reasons for that risk lies in the fact that there is no way, short of putting a well down there, to determine the thickness of the strata that overlie the oil bearing bed." (Tr. 1025-6)

Dr. Branner also frankly admitted that it was "not possible from a surface examination such as I made of the Elk Hills to determine the depth of the oil sands", and that "the purpose of my examination was to ascertain generally whether that could be considered as *possible* oil territory, and I made no attempt to determine whether it was paying oil territory." (Tr. 1020.) Not only was he unable to determine the depth of the supposed "oil sands", but he also was unable to determine that there were any such sands in the lands in question. The most he would say is that in 1904 his opinion "would have been, owing to the formation of the

Elk Hills, that they were *suitable for the accumulation of oil,* but that would not necessarily mean that they had accumulated oil. That could be determined *only by exploration.*" (Tr. 1016.)

Neither Mr. Veatch nor Dr. Branner, the two geological experts upon whom the government relies, pretended to be able to determine either that there actually was oil beneath the lands in suit or that, if there, it could have been reached by the drill in 1904. Mr. Veatch in fact admitted (Tr. 886) that at that time the lands in suit could not have been developed at a profit on account of the depth. The only "known conditions" at that time were (a) the apparent structure of the Elk Hills so far as revealed on the surface, and (b) the existence of oil wells and seepages a number of miles away on another anticline.

But no geologist, oil man, or other person, knew in 1904, or could have known: (a) whether there were any sand beds under the Elk Hills capable of holding oil; or (b) whether there was in fact oil stored in these unknown sands; or (c) whether this unknown oil was in commercial quantity; or (d) whether these sands, if there, could be reached by the drill.

Under these conditions, it is submitted that no prudent person, contemplating the expenditure of the large sums of money necessary in an investment of this character, would regard the testimony of Mr. Veatch or of Dr. Branner as showing that the

"*known* conditions were *plainly such* as to engender the belief that the lands contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end".

The government also introduced the testimony of a large number of witnesses who had been upon these lands at various periods between 1899 and 1904, who also gave their opinions as to the oil character of the Elk Hills. Their testimony removed none of the uncertainties mentioned above as they could not see any farther into the ground than anyone else. The majority of them were those who had made the wildcat locations following the discovery of oil in the Kern River Field in 1899, already mentioned. Only a few of them could be called experienced oil men. None of them professed to be geological experts. None of them claimed to have sunk any wells or to have discovered any oil upon the lands. The most that any of them could say was that, in their *opinion*, the land was good oil territory, but it is apparent from reading the testimony of even the most partisan witnesses that they simply thought the prospects were good for oil. All were agreed that drilling was the only practical proof of the existence of oil. Their evidence was, of course, of no value unless it could be shown therefrom that the known conditions on the lands were plainly such as to engender the belief that they contained oil in such quantity and at such

depth as would render their extraction profitable and justify expenditures to that end. As none of these witnesses professed to be geologists, they could of course give no testimony of value as to the geological conditions of the lands. Some of these witnesses attempted to justify their theories by references to oil seepages, oil sands and asphalt or brea deposits in various places, principally along the Temblor Range. To one unfamiliar with the record, the impression might be gained from a reading of the testimony that seepages or other forms of oil indications were found at many places upon the lands in suit.

But that such is not the fact appears from the maps introduced by the Government itself, Exhibits I and O. Exhibit I was prepared by Mr. Veatch, the chief expert witness for the Government, and purports to show all of the seepages or other forms of oil indications found by Mr. Veatch or testified to by other witnesses. This map shows only two such indications anywhere near the lands in suit, one in Section 32 of Township 30-24 and the other in Section 14 of Township 30-22. These are situated on either side of the township in which the lands in suit are situated, upon or near the anticline running through these lands. A great deal of importance was sought to be attached to the fact that they are thus situated as it was claimed that they indicated that there must be a deposit of oil lying between them.

Mr. Veatch indicates another place in the southeastern part of the Elk Hills and remote from the lands in suit. He does not pretend to have seen anything there himself, but placed this "indication" on his map entirely on the faith of the testimony of the witness F. D. Lowe, who testified that he could see there what appeared to be an oil sand. (Tr. 146.) Mr. Veatch also did not himself examine the alleged oil indication in Section 14 to the west of the lands in suit except as he saw it while passing on the train. (Tr. 776-777.) One witness, Jacob Kaerth (Tr. 417) testified that there were "asphaltum reefs" all over the township in which the lands in suit lie. Mr. Veatch does not include these on his map. He says that he did not see them himself although he was on every section in the township. (Tr. 801-2) Kaerth probably had some other township in mind. At any rate he declined to point out these asphalt deposits on the ground when opportunity was offered him to do so. (Tr. 423-4, 459-461) The witness Parker Barrett testified to seepages in Section 17 of the lands in suit, but as he examined the Elk Hills prior to the time the lands in suit were surveyed, and also was considerably confused as to his directions and the distance he had traveled into the hills, it is probable that he was referring to the supposed seepage in Section 32 of the township to the east. Mr. Veatch admitted that he had not found the seepages spoken of by Barrett, but ventured the highly improbable

suggestion that they had been covered over by later work. As this "later work" had been confined to the even sections, Mr. Veatch's explanation was apparently not satisfactory even to himself, or he would have placed these "seepages" on his map.

The Government witness F. O. Martin, a mineral inspector of the General Land Office, testified that he had prepared Exhibit O in connection with J. W. Kingsbury, another mineral inspector. Martin says that he made a number of examinations of the Elk *Hills* between 1910 and 1912 and claimed familiarity with practically every foot of the ground in the township in which the lands in suit lie. (Tr. 346) He was therefore more familiar with the Elk Hills than was Mr. Veatch. It is significant that the Martin map (Exhibit O) shows only *one* seepage or oil indication in the entire range of the Elk Hills, that in Section 32 to the east. If there had been more there it is to be assumed that he would have shown them for he evinced a strong disposition to favor the case of the Government. He was certain that all of the seepages in the Elk Hills were indicated on his map.

Very little need be said of the alleged oil indication in Section 14 to the west of the lands in suit. The witness Martin omits it. Other witnesses testify that it consists of asphalt washed down the canyon from the McKittrick Hills to the southwest and deposited along the banks of the stream running in this canyon. The witnesses Hotchkiss and Miley

determined its real character as early as 1900. (Tr. 1745, 1789, 2090) Miley testified that its character was so evident that any competent geologist must have known at that time that it was merely "float". (Tr. 1790) J. A. Taff, a competent and experienced geologist, made a careful examination of this place and its vicinity in 1913 and found that the "brea" occurring there had not impregnated the sands but consisted of separate particles of asphaltum material, mixed with other detrital material, carried by the stream from the southwest. He agreed with the other witnesses that this was merely "float" and that it had no connection with the Elk Hills anticline. (Tr. 2765-6) No attempt was made to refute the testimony of these witnesses. We may, therefore, take it as an established fact that the supposed "seepage" west of the lands in suit does not exist and that it must have been known to any competent observer in 1904 that it did not exist. This utterly destroys any contention based upon this supposed "seepage" since such seepage did not exist.

The other condition is the supposed "seepage" or "gas blowout" in Section 32 in the township to the east. A great deal is made of this asserted indication of oil and it is very likely that misapprehension concerning its true character influenced many inexperienced locators of claims in that vicinity.

The evidence shows beyond serious question that this it not a seepage or other indication of oil or

petroleum gas. It is a purely local and surface deposit of organic or vegetable matter, somewhat resembling peat, and having no connection with anything beneath. One or two Government witnesses testified that they had tested the material at this place with chloroform and that it showed oil. Although the chloroform test is the recognized method of determining whether oil exists or has existed, its use requires an amount of skill not possessed by the ordinary man. Even the expert witness for the Government, Mr. Veatch, admitted that he had tested this material with chloroform without finding an indication of oil, but he sought to explain his failure by saying that the oil, which had been there, had probably been burnt out on account of the escaping gas having caught fire. (Tr. 712-3)

F. M. Anderson, an expert geologist, tested this material with chloroform and in other ways, together with Dr. Stark, chemist for the Standard Oil Company, and found no evidence of oil or bituminous matter. He unhesitatingly pronounced this place merely a surface deposit of organic material and said that it had no connection with the occurrence of petroleum anywhere. Mr. W. H. Ochsner, another of the geologists who examined this place, said that he saw it in 1909 and concluded then that it was nothing more than a deposit of plant remains laid down during brackish water conditions in recent geological times. Its character was so evident

that he did not think it necessary to test it with chloroform. (Tr. 2215-16)

The most thorough test of this deposit was made by J. A. Taff. In order to ascertain the extent and character of this material, he had excavations made passing entirely through the deposit. In fact, he ran a cut through the principal occurrence of this deposit revealing clays beneath and showing that the alleged oil material had no connection with anything below by means of any crevice or break in the underlying formations. In this way he obtained an entire cross-section of the deposit and conclusively demonstrated that it was purely a surface deposit. A short distance below the surface of this material he found places where the organic matter impregnating the sands had collected in lumps. This material, he said, would "ball up" in the hand. (Tr. 2760-62) This is the same thing that the witness Silas Drouillard observed in 1874 and again in 1899 (Tr. 121-2) and conclusively shows that there had been no change in this deposit due to burning.

Mr. Taff also testified to testing a number of samples by means of chloroform. He also dried them and found they burned like an ordinary piece of peat. (Tr. 2761-2) He summed up his conclusions by saying that this is not an oil seepage or petroleum gas "blowout" and has no significance at all in determining the character of the lands in the Elk Hills. (Tr. 2762)

In this instance also, the Government made no attempt to contradict this testimony. In fact, the evidence that this is not a seepage or in any way an oil indication is so conclusive that it would have been idle to have attempted to show the contrary. We are, therefore, able to say that there was not a single surface indication of oil at any point in the Elk Hills. With these alleged "seepages" gone, the sole remaining conditions upon which the possibility of oil being in the Elk Hills could have been predicated by anyone in 1904 are the wells and seepages many miles away along the Temblor Range, which, according to Mr. Veatch's hypothesis, would indicate the presence of oil in the Elk Hills themselves, and the structure of the hills themselves and their position. Granting, however, that the wells and seepages along the Temblor Range and the structure and position of the Elk Hills themselves indicate the possibility, or even the probability, of oil, and granting also that the seepages which we have just been discussing were in existence as claimed, the most that such things could show from even the Government's point of view would be the existence of oil in the Elk Hills. There is no pretense that such conditions would show the amount of such oil or the depth at which it was located or whether its exploitation was practicable. This condition is, as we have already pointed out, as important as the existence of oil itself. The burden of showing not only that the oil existed in substantial quantities

in the Elk Hills, but that it also existed at such a depth as that it could be exploited at a profit, rested upon the Government. If there was no available way of determining the depth at which the oil was located so that at least some reasonable conclusion might be reached in regard thereto, that fact alone should be sufficient to demonstrate that the Government's case must fail when measured by the asserted rule laid down in the *Diamond Coal Company* case. It may be justifiable to take away a citizen's property upon a geological deduction when the conditions which support such theory are plainly known. Here, however, one of the conditions essential to the correctness of the Government's theory in this case is not known. It is not only not known, but there is not the slightest evidence to support even a speculation as to what the facts are with reference to such condition. To take away a citizen's property upon such condition of affairs would not be due process of law. It would be simply an act of confiscation, such as despots may exercise, but which can find no justification under our form of government.

The defendants might therefore be well justified in submitting this case upon the testimony introduced by the Government itself. For if our views are correct, such evidence falls far short of measuring up to the requirements of the rule announced in the *Diamond Coal Company* case; and it will not be disputed that, unless the evidence does bring this

case within that rule, judgment should go for the defendants.

We shall, however, go further and endeavor to show that the evidence is not only insufficient to sustain the Government's contentions, but that it affirmatively establishes the falsity of the Government's contentions.

IV.

The lands in suit were not only not known to be valuable for oil at the time patent issued, but all the known conditions then existing clearly indicated that they possessed no value as oil lands.

The foregoing statement and discussion has been to little purpose unless we can now fairly visualize the situation in the Elk Hills as it existed on December 12th, 1904, the date on which patent was issued.

The Elk Hills, as already stated, are a range of hills about seventeen miles long and about six miles wide. Upon the day on which patent was issued, there was not only not a single oil well or derrick upon any part of this land, but there was not a single seepage or other surface indication of oil. No mining work of any kind was going on. (Tr. 1971) The section corners were covered with location notices but they all dated back to 1900, 1901 and 1902. (Tr. 1971) They had, as we have seen, all been abandoned. There were no oil operations or oil indications upon adjoining territory to the north,

east or southeast of the Elk Hills that would indicate that the Elk Hills contained oil, and it is not pretended that there were. Adjoining the Elk Hills on the south and west were the Buena Vista Hills. Even the Buena Vista Hills did not at this time contain any oil wells or indications of oil. (Tr. 1991) The general opinion at that time was that "it was not looked on as good judgment to go out toward the Buena Vista Hills for oil." (Tr. 1724.) Prior to 1905 the general opinion of oil men was that oil was confined to a narrow line along the eastern slopes of the Temblor Range. (Tr. 1796, 1826, 1887, 1932, 1974, 2007, 2060, 2077) The Buena Vista Hills are between the Temblor Range and the Elk Hills. The oil field maps published annually by Barlow & Hill, and which were carefully prepared and used generally by oil men, show that prior to January 1, 1905, the oil development was along the northeast side of the Temblor Range and varied in width from two to three miles out to the foothills of the range. "At that time it did not get away from the foothills any distance to speak of." (Tr. 2007) The McKittrick, Midway and Sunset oil fields, as now developed, lie along the base of the Temblor Range from four to fifteen miles to the west, south and southeast of the lands now in suit. (*id*) The first discovery of oil in the Buena Vista Hills was not made until February 2, 1910. (Tr. 1994) As was said by Professor Branner, one of the geological experts for the government in this

case, in a report made by him to a firm of Los Angeles attorneys, dated October 18, 1910, concerning the oil possibilities of the Buena Vista Hills:

> "If oil had not been found, however, in the region south and west of the Buena Vista Hills a geologist would have been very bold indeed who would have ventured to predict the existence of petroleum in the Buena Vista Hills themselves." (Tr. 1992)

There were, therefore, not only no indications of oil upon the lands in the Elk Hills themselves, but there were no indications of oil upon any of the lands surrounding the Elk Hills. In fact, there was no development at that time at all along the main range opposite the Elk Hills in 1904 (Exhibits H-a, H-b and H-c, Tr. 111-12) The nearest wells were on the McKittrick anticline, which is really opposite the northern extension of the Elk Hills. These were four miles from the nearest lands in the Elk Hills. (Exhibits H-a, H-b and H-c, Tr. 111-12) The evidence is undisputed that for years oil operators confined their operations along the base of the Temblor Range.

The Barlow & Hill map, already referred to (Tr. 109-112, 2000) and the maps of the California State Mining Bureau for December, 1903 (Exhibit 13, Tr. 2157) demonstrate this conclusively. The most trustworthy indication of the place where practical oil men, or even speculators, think oil is to be found

is where they drill their wells. If the lands in suit had been known to contain oil, or had even been seriously considered to be probable or even possible oil lands as early as 1904, it is very strange that not a well was started in that vicinity until six years later. The excuses offered that the price of oil was low and that the lands were withdrawn are not convincing. Development work went on elsewhere in that region and resulted in an opening up of extensive areas in the Midway Flat for instance. The withdrawal order extended to lands in the Midway field and elsewhere where location and development continued right along. But it only suspended the land from *agricultural* entry. It did not prevent mineral entries (See letter from Assistant Commissioner of General Land Office to Register and Receiver, Visalia, February 11, 1904, Tr. 1555). See also *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568.

In reply to the attempts of the Government to show that the Elk Hills were generally considered to be oil lands by oil men prior to the date of the patent now in suit, the defendants put in the testimony of twenty-five men, all of whom had been engaged in the oil business in that vicinity in one form and another prior to and at the date of the patent. Most of these men were then active operators engaged in prospecting for or actually producing oil in the McKittrick or Midway districts. They were in a position enabling them to keep in close touch

with the comment going on in these districts concerning the places where oil might be found. Some of them were at that time actively engaged in looking for promising oil land either for themselves or for their employers and, in doing so, had occasion to review the possibilities of that entire region. If the Elk Hills were at that time *known* to be oil lands, these men would inevitably have learned of the fact. If there had even been a common impression that these hills were possible or "prospective" oil lands, they would also have known it. Most of the twenty-five witnesses referred to had occasion to go into the Elk Hills between the years 1900 and 1905, either to examine them for oil possibilities, or for other reasons. Many of them had seen and examined the alleged seepage in Section 32 of Township 30-24. With possibly two exceptions, they were men whose interests at the time they testified were entirely independent of those of any of the defendants.

It is not possible to discuss their testimony in detail within the space at our disposal, nor is it necessary to do so. Their names and references to the record where their testimony may be found are inserted in the margin.* With unanimity that

*NOTE:—(1) E. J. Miley, operator at McKittrick since 1900 (Tr. p. 1715-16); (2) David Kinsey, driller and superintendent on "West Side" since 1896 (Tr. p. 1796-7); (3) H. C. Goodyear, at McKittrick from 1902 to 1905 doing general work around oil wells (Tr. p. 1818); (4) W. H. Cooley, operator and superintendent in McKittrick and Elk Hills in 1903 (Tr. p. 1810); (5) S. J. Dunlop, operator in Midway since 1899 (Tr. p. 1820-1); (6) Fred H. Hall, interested in development of oil in Midway since 1901 and familiar with Elk Hills then and during recent development (Tr. p. 1824,1826); (7) H. W. Thomas, operator of extensive properties on "West Side", in oil business since 1900 (Tr. p. 1829-30); (8)

can come only from the clear fact of what they say, they testified that during all the years between the beginning of the oil industry in that region and the date of the patent in question, and even for several years later, it was the common belief among oil men in that region that the oil lay in a narrow zone along the eastern flank of the Temblor Range and that the Elk Hills were not even considered to be within the range of *possible* production. They even failed to recognize the possibilities of the present Midway field at that time, although a few of

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R. K. Howk, dealer in oil well machinery, operator of wells at McKittrick from 1901 to 1904 and engaged in examining prospective oil lands for other people at that time (Tr. p. 1842-44); (9) B. M. Howe, manager of oil companies, in oil business since 1898, drilling in Midway and examining surrounding country for locations in 1901 (Tr. p. 1887); (10) J. J. McClimans, operator in oil business since 1884 in Pennsylvania, and since 1900 in California, operating at McKittrick 1900-4 (Tr. p. 1932); (11) H. H. McClintock, superintendent of oil properties, superintendent pipe lines for Standard Oil Co. in McKittrick and Midway fields 1904-10 (Tr. p. 1974); (12) M. H. Whittier, operator of extensive oil properties in California and Indian Territory, twenty-three years' active experience, began operating oil wells at McKittrick in 1899 and in close touch with conditions there since (Tr. p. 1984-5); (13) C. A. Allison, sold oil well supplies in "West Side" 1900-3 (Tr. p. 1999-2000); (14) C. A. Barlow, oil operator in Midway since 1901, collected data for Barlow & Hill's maps from 1901 on concerning oil development in "West Side" fields (Tr. p. 2007); (15) Chas. T. Burks, oil operator in Midway since 1900 (Tr. p. 2060); (16) L. E. Doan, operated oil properties in Kern River, Coalinga and "West Side" fields since 1900 (Tr. p. 2071); (17) L. B. McMurtry, oil operator in Midway and elsewhere since 1900 (Tr. p. 2077); (18) E. W. Kay, oil operator in Midway since 1900 (Tr. p. 2085); (19) Fred Kimble, in oil business since 1900, at McKittrick and vicinity looking for oil lands in 1903 or 1904 (Tr. p. 2117-8); (20) John P. Kerr, fifteen years in oil business, engaged in looking for prospective oil land for large company in "West Side" fields from 1901 on, examined Elk Hills in 1902 (Tr. p. 2125); (21) R. E. Graham, oil operator in Midway since 1901 (Tr. p. 2132-3); (22) Samuel Shannon, oil operator, began oil business at Coalinga in 1898, went to "West Side" fields in 1904 (Tr. p. 2140-1); (23) U. S. Waugh, in oil business since 1898 (Tr. p. 2146-7); (24) C. A. Hively, field superintendent Kern Trading & Oil Co., in oil business since 1900, at McKittrick 1900-5 (Tr. p. 2161); (25) D. S. Ewing, attorney, interested in oil business in "West Side" fields since 1901 (Tr. p. 2250).

them said it was "suspected" that oil might be found there.

It was not until what was known as the "Honolulu well" was sunk in the Buena Vista Hills, in February 1910, that any importance was attached to the Elk Hills as oil lands. Then, and then for the first time only, did any drilling begin in the Elk Hills. (Tr. 1994, 2050-1) This was more than five years after patent was issued to the railroad company.

V.

The agents of the railroad company did not know, or even believe, that the lands in suit were valuable for oil in 1904.

It follows, from all that has been said in regard to the location and character of the lands in suit and the impossibility of anyone knowing or even thinking with reason that they contained deposits of oil in 1904, that the agents of the railroad company must have been in the same state of mind as everyone else. There is no suggestion in the testimony that they possessed powers of divination denied to oil men in general. They could not see into the ground any farther than anyone else. There is no evidence that any agent of the railroad company made secret explorations or sunk hidden wells in the Elk Hills. They knew, and could know, only what was open to the knowledge of others.

It cannot be seriously contended that any agent of the railroad company *knew* in 1904 that there was oil in the Elk Hills in such quantity and position as to warrant the reasonable hope of its extraction at a profit. The most that is really claimed is that agents of the company believed that there *might* be oil in these hills and therefore *believed* that the lands in suit had a speculative value for oil. Mr. Veatch called this speculative value a "prospective" value. What we call it is not as important as what it is. It is a misuse of words to say that these lands at that time had any sort of a value *for oil.* They had no known value for oil as no one could know that there was a barrel of oil in these hills in advance of drilling. They may have been thought by some to have had a value *for speculating* on the chance that there might be oil in them or that some purchaser could be induced to think there was. The sort of value Mr. Veatch relies on might exist (and frequently has) as to lands absolutely barren of oil.

C. W. Eberlein, the land agent of the railroad company, who made the non-mineral affidavit to the railroad company's selection list, knew nothing about the lands himself. He had never seen the lands. He had but recently taken charge of the land department of the company. "I would not have known about them if I had been told. It must be remembered that I was as green about the land affairs of the Southern Pacific, almost, as it was

possible to be." (Tr. 1292) He found that a large amount of base lands, under the company's land grant had been lost, and he at once instructed his assistants to prepare a list and to make indemnity selections. (Tr. 1087) It was his plan to select promptly and to save everything possible to the company. (Tr. 1157) He says that the company had theretofore understood that indemnity lands had belonged to it even before selection, but a ruling to the contrary had been made shortly before this time and he thought there was danger of losing more in the future. This "was one of the first things I paid attention to." (Tr. 1155-6)

Some stress has been laid upon the fact that Mr. Eberlein did not at that time direct a special examination of these lands. In truth, he had no reason to do so. They were far removed from producing oil territory and Mr. Eberlein had good reason to believe that his assistant, Mr. Stone, knew all about them. Stone himself testified that he was acquainted with the lands in Township 30-23 from having been frequently in that country for two years preceding the selection. (Tr. 1029)

Mr. Eberlein says: "That list of lands was made by my order on the representation to me that it was non-mineral by my assistant, who was fully informed." (Tr. 1114) "He was thoroughly familiar with the lands, so he told me." (Tr. 1088) On being asked whether he had sent anyone to make an examination of these lands he replied: "I didn't

consider it necessary. Stone was familiar with the land—claimed to be." (Tr. 1137)

That the general situation in 1903 required prompt action to prevent the loss of indemnity lands, wherever situated and whatever their character, is shown by the advice of Mr. D. A. Chambers, who was the Washington attorney for the railroad company at that time. In reply, apparently to a communication from Mr. Eberlein as to the effect of the general withdrawal order upon the contemplated selection, Mr. Chambers wired: "I think you should immediately select lands in Township thirty south range twenty-three east and if local officer refuses list appeal to commissioner. This ought to be protection against adverse claimants filing or alleging settlement later than our selection. Right of railroad company to indemnity lands is determined by their status at date of selection." (Tr. 1479)

The "adverse claimants" whom Mr. Eberlein and Mr. Chambers had in mind, could not have been mineral claimants, as the filing of a selection list could not affect the right of a mineral locator to file upon the ground at any time prior to actual patent. It is therefore apparent that the haste in making the selection of the lands in suit was not due to any fear of mining locations but was thought necessary in order to prevent possible agricultural settlement on these lands.

As soon as possible after the receipt of this telegram, the application for patent to these lands (Selection List 89) was filed with the local land office at Visalia. This was on November 14, 1903. (Tr. 3815)

This selection was promptly rejected by the local land officers because of the general withdrawal order of February 28, 1900. We can best express the situation, as Mr. Eberlein understood it, by his own words. "It was a blanket withdrawal," he says, "of everything because—I didn't understand it was because of any discovered mineral, but because of the mineral excitement probably, in the neighborhood in there somewhere in that part of the country. * * * * * I talked with Mr. Stone; I don't know whether anybody else; and from my talk with Mr. Stone and the extent of that withdrawal, the impression on my mind was that it was just one of those things, a sort of drag-net affair and that there might or might not be mineral in any of that territory. There had been none found, so far as I know. * * * * * * It was one of those hastily done things that didn't mean that the land was mineral." (Tr. 1160)

The rejection of this list, therefore, was not an indication to Mr. Eberlein that the lands were mineral. "Why, it came back to the office," he says, "and my impression being that it was probably something that required only action by the government to release, or release in part, I made application to

the Secretary of the Interior, through our representative in Washington, to have a representative of the Department make an examination of these lands covered by our list." (Tr. 1161)

We are already familiar with the action taken by the government in sending a special agent, E. C. Ryan, to examine these lands. In speaking of Ryan Mr. Eberlein said: "I never saw him, never had any communication with him; but he was sent into the field and did make an examination and reported. * * * * The impression conveyed to me was, and I found the fact to be, that the suspension order was revoked, at least as to these lands of ours, and we made the selection and the selection list was approved." (Tr. 1161-2) He further testified that the action of this inspector was in no way influenced or controlled by him or by any one else connected with the railroad company, to his knowledge." (Tr. 1162)

The examination and report of Ryan had an important influence in confirming in Mr. Eberlein's mind what Stone had already told him about these lands. "I also had," he says, "the direct backing of the government in making that non-mineral affidavit." (Tr. 1114, 1163)

It should be borne in mind that Mr. Eberlein, when he selected these lands, understood that there was a deficiency in the land grant of the company and that there were not sufficient lands to supply the deficiency in the primary limits. (Tr. 1154)

So it was not so much a question as to the value of these lands for agriculture or grazing as it was whether the company would receive *any indemnity* for its losses within the granted limits. The company had to take these lands or none at all. The government gave its land grant to aid the railroad in its construction through an arid region. That the land it was thus forced to take had but little value was the company's misfortune. It was not its fault.

The practical oil men and geologists in the employ of the Southern Pacific Company during the year in which these lands were selected were J. B. Treadwell, Josiah Owen, E. T. Dumble and F. M. Anderson. All of them testified, except Josiah Owen who was dead.

J. B. Treadwell was in charge of the development of oil for the Southern Pacific Company until the spring of 1903 when he was succeeded by E. T. Dumble, who was then and has since been the consulting geologist of the Southern Pacific Company but has not been connected with the Southern Pacific Railroad Company. (Tr. 424, 2907)

One of Mr. Treadwell's duties was to advise the land department of land belonging to the company that either was oil land, or might possibly be oil land, in order to prevent its sale as agricultural land, but he did not consider that the Elk Hills had any value as oil land. (Tr. 436) It was not

considered promising oil territory at that time. (Tr. 437)

As Mr. Dumble's other duties required that he spend a great deal of his time in Texas and elsewhere, he appointed Josiah Owen as his assistant to take immediate charge of oil operations in the California fields where the company was then producing oil. (Tr. 2907)

Owen was dead when the case was tried, but Dumble testified that he (Dumble) "was never in the Elk Hills, or on the lands in 30-23, that is in controversy in this suit; up to the time that the patents were issued there had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson." He adds:

"I have absolutely no recollection of ever having spoken to anyone or written anyone whatever regarding the oil possibilities of this land prior to the issuance of these patents; nor is there in my files, so far as the exhaustive search will disclose, a single scrap of evidence in regard to it." (Tr. 2971)

Mr. F. M. Anderson, a geologist, testified that he met Mr. Owen for the first time at McKittrick in March, 1903 (Tr. 2381) and that he visited the Temblor Range with Mr. Owen (Tr. 2381); that as they came across the valley from Bakersfield to McKittrick he saw the hills now known as the Elk Hills. Mr. Owen told him he had been there about a month and had visited about all parts of the

valley contiguous to McKittrick. Mr. Anderson then asked him if he had been in those hills (meaning the Elk Hills) and he said he had. Upon being asked what he saw, Mr. Owen described the geological conditions. "I asked him if it looked anything like oil land over there and he said he hadn't seen anything that looked like oil; that he didn't think it was an oil district or that it was oil land. * * * * I remarked to Mr. Owen that I thought the hills were a long ways out from the foothills of the Temblor Range where the oil was likely to be. He said yes, it appeared that way to him." (Tr. 2382-3) On another trip by Owen and Anderson two days later into the Midway field, the Elk Hills were again discussed, among other things, and "our conclusion was that these hills laid too far away from what he had seen as representing the outcrop of the oil sands—too far away to ever be valuable oil territory." (Tr. 2388)

It is also in evidence that Mr. Owen stated to the geologist W. H. Ochsner in August, 1907 that he thought the Elk Hills would not be productive territory; that he thought the hills were too far out to fill. (Tr. 2172)

C. A. Hively also testified that some time in the Fall of 1904 or 1905, he was not sure which, Mr. Owen "came into the office one evening, after he had been out a couple or three days, very tired and said that he was all worn out from horseback riding and that he had been over every foot—or some

expression of that kind—of what is known as the Elk Hills territory trying to discover some indication of oil. He told me he was unable to discover any indications which led him to believe that there was any oil in the Elk Hills field." (Tr. 2161)

S. P. Wible, a witness for the government, also testified that in 1903 or 4 he went through the Elk Hills with Mr. Owen and that he "discussed with Mr. Owen the geological conditions and oil possibilities of lands in the vicinity of McKittrick. * * * * He told me that he believed the oil measures lay under the Buena Vista Hills and that he thought they lay very deep under the Elk Hills." (Tr. 320) "* * * * * * * Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought they were probably so deep they couldn't be reached and made to pay. I had some conversation with him with reference to some land in Township 30 South, Range 23 East, in which he told me that oil could be reached at three thousand feet or over and we didn't drill because we didn't figure that it would pay to drill for it. At that time there were no such wells drilled in the country to that depth. (Tr. 328)

Charles F. Haberkern, also a government witness, testified that he knew Mr. Owen intimately and had been in the Elk Hills with him, the first time in August or September, 1904, when they went all over the Elk Hills from one end to the other.

Mr. Owen "told me the land is very valuable for fullers earth and gypsum but he thought there was oil there but that it was very deep and wouldn't pay to go after it." (Tr. 350)

W. H. McKittrick, also a witness for the government, testified that Mr. Owen told him in 1907 that he had been quietly making examinations of the Elk Hills for several years and that he had located large deposits of fullers earth there. "He said," added the witness, "there was a possibility of oil there but oil could not be found under thirty-four hundred feet. Of course, at that time no one thought of going thirty-four hundred feet for oil. I didn't know of anybody else thinking about it." (Tr. 528)

It is very apparent from what several of these witnesses have said that Mr. Owen was thoroughly convinced, as time went on, that there were valuable deposits of fullers earth in some parts of the Elk Hills. It is not testified by anyone that any of these deposits are in the lands in suit. In fact, it is the present contention of the government that there is no fullers earth in the Elk Hills. (Tr. 683) It is, however, equally evident that Mr. Owen did not attach any importance to the Elk Hills as oil lands. The most he ever seems to have thought was that there was a "possibility" of oil being there. But in every instance he qualified this by the further caution that if it was there it would be deep, too deep for profit.

Mr. Dumble testified also that he did not know that application had been made for patent to the lands in suit by Mr. Eberlein; that he did not have any conversation with Mr. Eberlein, Mr. Stone, or anyone connected with the land department of the company concerning the selection and listing of these lands; that no one in his office and under his direction made any such suggestion to Mr. Eberlein or Mr. Stone to his knowledge; that he did not give any such directions to anyone and had no communication with Mr. Kruttschnitt or other officials of the Southern Pacific Company, the Southern Pacific Railroad Company, Kern Trading & Oil Company or the Associated Oil Company, by letter or otherwise, with reference to selecting lands in the Elk Hills; that these lands were not applied for by Mr. Eberlein as the result of any recommendation or suggestion made by him to anyone; that the lands in this township had never entered into his mind as oil land at all. The conditions around McKittrick all seemed to him to preclude the possibility of oil occurring that far away from the outcrop. (Tr. 2927-8)

Mr. Anderson, as we have already seen, did not believe these lands were of any value as oil lands. No useful purpose would be served in repeating or commenting upon his testimony again.

If the testimony of these witnesses is to be believed, and there is no evidence to the contrary, it should be conclusive upon the question as to

their knowledge, or even belief, as to the oil character of the lands in suit at the time patent was issued. That they could not have known that there was oil in the Elk Hills in such quantity and position as to warrant the reasonable hope of its extraction at a profit is self-evident; that they did not believe that there was any such oil is not only apparent from their own testimony but is corroborated by the admitted facts and the testimony introduced by the government itself. For the government's own geological witnesses, it will be remembered, declined to even express the belief that any oil could have been found in the Elk Hills in 1904, or at any other definite period, at such a depth as would have permitted its extraction even at a loss.

VI.

The lands in suit have not yet been proven to contain valuable deposits of oil or other minerals. The uncontradicted evidence shows that no attempt was made to develop the Elk Hills as oil lands until subsequent to February 2, 1910, more than five years after patent issued to the company. Subsequent to this date thirty-six wells were drilled within the limits of the Elk Hills varying from a few hundred feet to nearly five thousand feet in depth. Only three of these wells resulted in the discovery of as much as a gallon of oil and these three wells were closed down because they were not profitable wells.

Under the rule laid down in the case of *Diamond Coal Co.* v. *United States*, 233 *U. S.* 236, the inquiry concerning the mineral character of the land now sued for must be directed to the time when the patent was issued. If it was not known to be mineral then and under the conditions then existing, no subsequent discoveries or improvement in drilling methods can be considered as a basis of recovery.

The issue here is as to whether or not these lands were known to contain valuable deposits of oil at the date of the patent, and it must follow that if all exploration to date has failed to establish the mineral character of the land, it is immaterial what any one may have supposed or believed as to the existence of mineral before the patent was issued.

Evidence that no such deposits were then discovered and that none have been discovered since, is therefore material to establish the fact that these lands were not mineral lands at the date of the patent. As already said, the existence of mineral, in this case oil, in these lands at the date of the patent must be demonstrated as a fact and not merely as a belief.

It is our contention that these lands were not only not *known* to be mineral lands at the date of the patent, but that they could not have been so known for the very good reason that subsequent work on adjoining lands interspersed with the sections in suit has pretty thoroughly demonstrated that these lands are not mineral at all. If they do not contain deposits of oil, which would have been valuable under conditions existing in 1904, the government has not been defrauded in any view we may take of the evidence.

It is not necessary to discuss the details of the voluminous testimony concerning the wells which have been recently drilled in the Elk Hills. There are certain facts standing out in this testimony so prominently that we may safely rely on them without concerning ourselves with the many suggestions and insinuations of bad faith and concealment which counsel for the government have indulged in with regard to some of these wells.

We have seen that in the early years oil operators and prospectors confined themselves to a narrow and

broken line of development along the base of the Temblor Range. As time went on they gradually "felt their way out" farther and farther in the Midway into ground not thought at first to contain oil. This discovery of new territory stimulated interest in other places and soon locations were being made in the Buena Vista Hills and even some as far out as the Elk Hills. In 1909 actual drilling commenced in the Buena Vista Hills in Section 10 of Township 32-24. This well encountered considerable gas which further stimulated interest in outlying districts, particularly as land close at hand had all been located somewhat earlier.

This well in the Buena Vista Hills, which is frequently referred to in the testimony as the "Honolulu" well, came in as a "gusher" on February 2, 1910. (Tr. 1994) John A. Pollard, the man who "brought in" this well, says that the morning after the oil was struck, he observed with his field glasses great activity in the valley to the north where he could see numerous teams hurrying into the Elk Hills with materials for building camps and drilling wells. This extended, he said, almost across the south portion of the hills. (Tr. 1994) During this excitement all sorts of people went into the Elk Hills in the mad rush to get some of the remaining open land or to lease or purchase existing claims. Even practical oil men and companies caught the fever and rushed in with the rest, since the discovery of oil in the Bnena Vista Hills had upset their prior

notions. B. T. Dyer, who at the time he testified was field manager for the General Petroleum Company, in speaking of this excitement said: "Everybody was going in. We followed along like a lot of sheep." (Tr. 2051) The Associated Oil Company and a number of other large companies went in with this same rush. (Tr. 1888, 1804, 2134)

The evidence of expenditures, for drilling in the Elk Hills following this rush, shows that the companies and individuals who went in there at that time spent $1,846,613. This by no means represents the entire cost of this development as in some cases it was not possible to ascertain what was spent. It is quite probable that the total exceeds two million dollars. *Exhibit* 16 *shows that there were thirty-six wells drilled within the limits of the Elk Hills varying from a few hundred feet to nearly five thousand feet in depth. Only three of these wells resulted in the discovery of as much as a gallon of oil.* These three will be spoken of later. Today these hills are abandoned by those who spent this money so lavishly in the effort to prove the existence of oil. One witness testified that he had ridden from one end of the hills to the other in December, 1912, without meeting a soul. (Tr. 2134) Another said that in November of the same year all the properties were idle and in some places the derricks had been torn down and hauled away. (Tr. 2259) The witness R. K. Howk testified that he had bought some abandoned rigs in these hills and was negotiating for

the purchase of others. (Tr. 1845) This suit was started during the height of the excitement when drilling was active in these hills. Before the completion of the testimony this drilling had ceased and the hills had returned to the same quiet that had prevailed before, with here and there a watchman to protect machinery not yet removed. This suit, like the drilling of these many unsuccessful wells, was the product of the sudden excitement of the time, and, again like the wells, must fail because the oil is not there in commercial quantity.

On the western side of the township, in which the lands in suit are situated, the Scottish Oil Field Company drilled a well 4005 feet deep in Section 20, got nothing and abandoned the well and the section. (Tr. 2041-2) The Redlands Oil Company, of which the government geologist Ralph Arnold was a director, drilled a well 2850 feet deep on Section 30 of the same township, got what they thought was a "color of oil," thoroughly tested the well and abandoned the ground. (Tr. 1954-5) The Midway Pacific Company drilled a well on Section 32 of the same township to a depth of 2425 feet, got nothing and abandoned the property. (Tr. 1954) The Hillcrest Oil Company drilled a well on Section 28 of the same township to a depth of 1670 feet, found some gas but no oil and quit work there in April, 1911. (Tr. 1953)

The witness John Lang, who had charge of the drilling of the Hillcrest well and advised in the

drilling of the others mentioned, testified in December, 1912, that he thought the *eastern* part of this township was "possible" oil territory but said that he did not think the territory where the Scottish well was situated was oil territory. As to some of the other wells on the western side of the township, he said that he thought "they would have a chance" to get oil if they went deeper. (Tr. 1963, 8, 9) This is the most favorable statement concerning the western half of this township any witness made since the wells have been drilled there, but it falls very far short of proving the oil value of that portion of the township. It is hardly the "clear and convincing" evidence demanded by the law.

Coming to the eastern side of the township, we find that all of the wells drilled there were put down by the Associated Oil Company, of which the Southern Pacific Company owns a majority of the stock. This company drilled three wells on Section 22, 1185, 1480 and 2980 feet deep respectively. None of these found oil, although they were all "favorably located" near the crest of the Elk Hills anticline. (See Exhibit O.)

The Associated Oil Company also drilled four wells on Section 24 of this township, 95, 1187, 1291 and 3887 feet deep respectively, the latter of which found oil in considerable but not commercial quantity, considering the depth and small production. It also drilled four wells on Section 26 of the same township. Three of these were shallow. The fourth

was 4030 feet deep and also found oil, which did not prove to be commercial in quantity. The same thing was true of a well drilled by the same company in Section 30 of Township 30-24 to the east, which was drilled to a depth of 3838 feet.

These three deep wells of the Associated Oil Company are the ones which counsel for the government has described as "gushers" coming in with an "enormous" production. They are the only wells in the entire Elk Hills district which have produced as much as a gallon of oil. All the others lying to the east and south as shown on Exhibit 16 proved to be failures and have been abandoned. The case of the government, so far as it attempts to show that there is really oil in the Elk Hills in commercial quantities, must therefore rest entirely on these three wells of the Associated Oil Company. In short, the defendants have themselves furnished the only evidence that there is a drop of oil in the Elk Hills and have furnished this evidence since this suit was started.

At every turn it was suggested by the government that the Associated Oil Company has endeavored to conceal the true condition of these wells in order to make it appear that they are not successful. This accusation is a virtual admission that their showing has not been successful or encouraging. We fail to understand by what process of reasoning the officials of the Associated Oil Company, after having spent more than half a million dollars in trying to

demonstrate that these were oil lands, would conclude to attempt to conceal their production and even to destroy the wells, as counsel has claimed. If the interest of the Southern Pacific Company, as dominant owner of the stock of the Associated Oil Company, ever required that the existence of oil in the Elk Hills be concealed because of this suit, the time to act would have been when the suit was started, which was long before either of these wells struck oil. It would have been easy then to have found a plausible excuse to cease drilling and thus deprive the government of its only evidence that there was a drop of oil in these hills and, at the same time, save the major portion of this half million dollars.

Not only did the Associated Oil Company continue its own wells, but it encouraged the Scottish Company to drill deeper in Section 20 to the west at a time when it had determined to cease drilling. (Tr. 2043, 6, 7) It is obvious that the Associated Oil Company, having gone into the Elk Hills along with all the others during the general excitement, endeavored in good faith to demonstrate whether there was oil there in paying quantities or not. In the natural course of things the field officers in charge of production must have suggested and encouraged the first venture into these hills. After they had gone in it would be their tendency to endeavor to justify themselves to their superiors. And it is significant that this company persisted in its

efforts to demonstrate that there was oil in the Elk Hills long after the other adventurers had become disgusted and abandoned the field.

The fact that the Associated Oil Company kept on as it did in the effort to prove that there was oil in these hills seems to be incomprehensible to the counsel for the government in this case. The simple and obvious explanation that this company kept on because it had put a large amount of money into those hills and wanted to find enough oil to recoup itself, is not consistent with the atmosphere of suspicion and distrust with which the government has attempted to surround this case. Nor does it occur to them as possible that the officers and counsel of the railroad company never thought it necessary to call a halt upon the proceedings of this subsidiary company. The railroad company has had nothing to conceal, and being confident that there has been no fraud at any stage of the proceedings involved in this suit, it has had no reason or wish to force the Associated Oil Company to abandon its prospecting in the Elk Hills or to conceal or misrepresent the production of its wells.

Counsel for the government have attempted to explain away the statement just made by charging that it was the purpose of those in charge of the affairs of both the railroad company and the Associated Oil Company to fraudulently retain the odd sections in Township 30-23 for the railroad company as agricultural lands, and to get mineral

patents to portions of some of the even sections for the Associated Oil Company as oil lands.

Among all the insinuations and innuendoes of the government attorneys, it is not stated or claimed that the men in control of the railroad were fools, and yet if the theory of the government attorneys is correct that the railroad men knew the land was valuable for oil, the last thing they would do would be to do that which it is claimed they did. The railroad company already has a patent to the ten sections of land in suit, which, according to the assumption of the government, are valuable oil lands worth at least fifteen million dollars. The railroad company owns but fifty-one per cent. of the stock of the Associated Oil Company. It is not conceivable that those in charge of the railroad company would deliberately imperil its patent to the *ten* sections on the chance of obtaining a mineral patent for its subsidiary for a *part of two* sections, in which the railroad would have but a fifty-one per cent. interest if the patent were obtained. Intelligent men do not do business that way. The very fact that the Associated Oil Company did go ahead with its wells and was permitted to make the only discoveries of oil that have ever taken place in the Elk Hills, and that this was all done *after* the government had started this suit, is convincing proof that the charge of fraud in this case is without foundation.

The attitude of the government in connection with these wells of the Associated Oil Company has been most peculiar. Instead of endeavoring to show the true history of these wells by calling for the records concerning them or offering the testimony of someone who was familiar with their operation, only the evidence of one man, who had been present during a few days when one of the wells had a heavy production, was offered during the case in chief. (Tr. 409-16) This witness testified that the well on Section 30 had flowed for three days at the rate of 406 barrels a day. He left the well then and was not able to state whether this flow continued or whether the well was simply "blowing its head off" as frequently occurs when a well is first tested out. The truth of the matter, as appears from the daily reports of this well later put in evidence, is that the production of this well rapidly fell off until it would not pay to pump it. Yet this well has been constantly referred to in argument as a "406 barrel well."

On the other hand, the defendants put in evidence in this case the full official records of each of these wells showing day by day what was done with them in the effort to make them producers. The witness W. E. White, chief clerk to the Field Manager of the Associated Oil Company, in whose custody are kept the daily and other drilling and operating reports of all the wells of that company, produced graphic charts showing just what each

of these wells had done and the efforts made to "bring them in." These charts were introduced as Exhibits 172, 173 and 174 and constitute a fair summary of what is shown in these drilling and operating reports, which were produced in connection with his testimony and fill 521 pages of the record. (Tr. 3157-3168)

The auditor of the Associated Oil Company, P. G. Williams, testified from his records that this company had spent the sum of $517,613.94 in development in the Elk Hills, and had produced in all 30,327 barrels of oil from its wells there. (Tr. 3122-4) W. E. White testified that these wells were handled just as any other well would be, and that every effort was made to make them produce. (Tr. 3170) There can be no reasonable doubt that this statement is the truth, as an analysis of the daily reports of the wells shows beyond question. They were shut down on August 23, 1912 (Tr. 3156). There was no drilling and nothing was being done by the Associated Oil Company in the Elk Hills. (Tr. 3173)

In the effort to give some semblance of truth to the claim that the graphic logs or charts, prepared by the witness White, do not state the facts, government counsel went to the trouble to add up on these charts the daily "estimates" of production. He finds that the total thus obtained is far greater than the "Actual Monthly Total" appearing on these charts and therefore concludes that Mr. White in-

tentionally misrepresented the true production of these wells. We are not interested particularly in refuting this sort of an argument, but are calling attention to it as one more instance of the many unfounded statements concerning these wells. The witness explained that these daily estimates were at best only guesses and that it was the common experience in the oil fields that they ran much too high when compared with the actual *measured* production as shown at the end of each month. (Tr. 3206, 3250, 3381-2) The argument of government counsel that the daily records of these wells showed that there was an actual total production in the amounts he states, is therefore without any real foundation.

To sum up the situation concerning the present condition of the Elk Hills as to being known oil lands, it must be admitted that the even sections, in the western two-thirds of Township 30-23, have been proven not to be oil lands by the development, which has taken place there since 1910. In two even-numbered sections in the eastern third of the township some oil has been found. Whether this oil is in commercial quantity, considering the depth and expense of drilling, is at least open to serious question. According to the testimony of the witness F. M. Anderson, based on amortization tables prepared by him, these wells cannot be made to pay for themselves. (Tr. 2502, 2505, 2516) The burden of proof is on the government to show that these

wells are commercial, and it has not done so. It is to be remembered in this connection that the witness A. C. Veatch gave it as his opinion that the Elk Hills could not be developed commercially at this time and might not be until some time within the next hundred years.

No proof whatever has been offered showing that there is oil known to exist in the *odd* numbered sections involved in this suit. No wells have been drilled in any of these sections and if it is determined that any one of them contains oil it must be because of the discovery of oil somewhere else. Any inferences, based on the discoveries in these three Associated wells, that oil also exists in these odd sections, must survive the counter inference that there is no oil within them, because of the failure to find any in the wells in the even sections in the western two-thirds of the township. No matter how we take it, the existence of oil in commercial or any other quantity in any of the lands in suit is so shrouded in doubt that the Court could not justify a finding that any one section or quarter section is known oil land *today*. If this is true, there can be no finding that any of this land was known oil land in 1904, when the nearest discovered oil was from four to ten miles away from the lands in suit, and when the available drilling appliances would not have made it possible to sink a well to the depths of these Associated wells in the Elk Hills, which were not sunk until 1910.

VII.

The learned District Judge who decided this case in the court below did not hear the evidence, which was taken before a commissioner; and his conclusion that the patent should be cancelled was based upon a misconception of the meaning and effect of the evidence.

The learned District Judge who tried the case below bases his decree upon conclusions drawn by him from the evidence referred to in his opinion. This evidence was not heard by him, but was taken before a commissioner. These conclusions will now be discussed for the purpose of showing their lack of support in the evidence itself and their legal inadequacy as a basis for the decree.

(1) *Finding that lands were in "recognized oil district."*

> His first finding is as follows: "The lands in controversy were, at the time of the proceedings resulting in the patent, within a known and well recognized oil district and had been previously returned by the U. S. Surveyor as oil bearing lands, and at the time the selection list was first filed were within a previous withdrawal order of the department because of their probable oil character."

This finding is erroneous in several important respects. There is no evidence that the lands were "within a known and well recognized *oil district.*" The proof is undisputed that they were several miles *outside* of the recognized oil district. The nearest known oil in 1904 was four miles from part of the lands in suit and a greater distance from the rest, with an unproductive valley between. If by the expression "oil district" he meant a district within which locations for oil had been made, his finding is correct, but is of no importance, as locations without discovery prove nothing.

Nor were these lands "returned by the U. S. Surveyor as oil bearing lands" in the sense that there was any oil known to exist in them. The surveyor's return merely reported that there was on these lands "a geological formation with asphaltum exudations, that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits." (Tr. 686) This is at most but the statement of a speculative opinion. In so far as it mentions "asphalt exudations" it is contradicted even by the numerous government witnesses called in this case, none of whom saw any such asphalt on these lands or near them. Neither Exhibit I nor Exhibit O presented by A. C. Veatch and F. O. Martin, the two leading geological witnesses for the government, indicates any asphalt anywhere in the township in question. There was,

therefore, no real foundation for this portion of the Court's finding.

The testimony on both sides, as heretofore indicated in this brief, proves that at or before the date of the patent in 1904, the Elk Hills District was not considered to be oil territory. The many "wildcat" locations made in these hills in 1899 and 1900, following the Kern River oil excitement, had not resulted in any discovery of oil, or even in a serious attempt to make such a discovery. Before the date of the patent even these speculative locators had given up in disgust. There is, therefore, no basis in fact for saying that these lands lay within a well recognized "oil district".

The finding that these lands had been withdrawn from agricultural entry is not important as evidence of their real character. It is undisputed that this withdrawal was made by the government in 1900 and that it covered a very large area. It is not claimed that it was based on any real determination of the intrinsic character of the land itself. The withdrawal order was not *proof* of oil in the land. Therefore it does not support the finding of the Court.

The only proper bearing of this withdrawal order of 1900, as well as of the erroneous return of the government's surveyor, is upon the action of the government itself. When the railroad application was received, the surveyor's return and this withdrawal were matters of official record in the United

States Land Office. They served to put the government on its guard. Because of them the government disregarded the formal selection affidavits made by the railroad company and sent one of its own agents, E. C. Ryan, to examine the land. He did examine it and reported that it contained no oil. Thereupon the patent was issued.

In another portion of his opinion the learned District Judge seeks to negative the force of this Ryan report by pointing out the fact that Ryan was not an expert. Be that as it may, he was the man selected by the government to make this examination, and his report was accepted and acted upon in releasing the withdrawal order and patenting the lands. There is no evidence that his designation to make the examination or his report was procured or influenced in the slightest degree by the railroad company.

(2) *Finding as to agricultural character of lands.*

The next conclusion of the learned District Judge concerns the character of the land sued for. It reads as follows:

> "They are rough, broken, arid lands of no substantial value for agricultural purposes or any other purpose than their oil contents."

The inference obviously sought to be drawn from this finding is that the railroad company could not have desired these lands except for their supposed oil value. But the evidence does not support either the finding itself or the inference sought to be drawn from it. It is abundantly shown that these lands are valuable for grazing. (Tr. 121, 191, 1982-4, 2044, 2046, 2111-15). It is also in evidence that C. W. Eberlein, the land agent of the railroad company, understood when he selected these lands that there was a shortage in the land grant of the Southern Pacific Railroad Company and that there were not sufficient surveyed lands within the indemnity limits to supply deficiencies in the place limits. (Tr. 1154-6) So it was not so much a question as to the value of these lands for agriculture or grazing as it was whether the company would receive *any indemnity* for its losses within the granted limits. It was forced upon the railroad company to take these lands or none at all. The government gave its land grant to aid the railroad in its construction through an arid region. It was therefore no indication of a fraud when the company selected the lands the government had given even if the selected lands had little apparent value.

(3) *Finding that C. W. Eberlein did not have lands examined.*

The third finding of fact made by the learned District Judge is as follows:

> "The statement in the affidavits of Eberlein that he has caused the lands to be carefully examined by the agents and employees of the company as to their mineral or agricultural character was and is untrue. This is admitted."

This finding is not true. In the first place, it was not "admitted" at the trial or during argument that the lands had not been examined. On the contrary, it was asserted and proven that they had been examined. C. W. Eberlein, the land agent of the railroad company who made the selections and the affidavits in question, was called as a witness by the government and said: "That list of lands was made by my order on representation to me that it was non-mineral by my assistant who was fully informed." (Tr. 1114). "He was thoroughly familiar with the lands, so he told me." (Tr. 1088). On being asked if he had sent anyone to examine these lands specially he said: "I didn't consider it necessary. Stone was familiar with the land —claimed to be." (Tr. 1137).

George A. Stone, the assistant referred to by Eberlein, who was the field examiner of the company at the time of the selections, was called as a witness by the government and testified as follows:

"I supervised the preparation under Mr. Eberlein's direction. * * * I am acquainted with selection list No. 89 of the main line grant and had to do with its preparation. * * * I am acquainted with the township just east of McKittrick, but don't remember its number just now. It is probably 30-23. * * * Such knowledge as I had of the lands was general in character from my general knowledge of the country. I had been frequently in the country for two years preceding." (Tr. 1028-9)

There is no testimony modifying or contradicting this. It therefore appears as an undisputed fact that Stone as land examiner for the company was familiar with this land as a result of his frequent trips into that country. Whether or not his examination was sufficient is not important in this connection. The testimony of Eberlein indicates that he believed that Stone was "fully informed". As he acted under such belief the fact that Stone may not have made a thorough or careful examination does not affect the good faith of the Eberlein affidavit. The execution of the affidavit was therefore not in itself any evidence of a fraudulent purpose although the Court below seems to have so considered it.

Nor is the fact important, which is mentioned by Judge Bean, in this connection, that Eberlein did not have these lands examined by geologists then in the employ of another department of the company. These men were not subject to his orders.

Moreover, there is no showing of any circumstance suggesting to him that such an examination was required. If he had procured a report from these men there is no doubt that they would have told him, as they did inform those to whom they did report, that these lands were "too far out" to be oil lands.

In this connection it must be borne in mind that Eberlein knew soon after he filed his selection list that the government had itself caused those very lands to be examined and had pronounced them not to be oil lands. Whatever occasion there might have been for him to cause a special examination to be made was removed by the act of the plaintiff itself. So far as Eberlein knew Ryan was as much of an expert as anyone he could have procured.

(4) *Finding that Eberlein correspondence showed knowledge of mineral character of land.*

The fourth finding of the Court below is too long for convenient quotation at this place. Its substance is that it "clearly appears from the documentary evidence in the case, and particularly from the correspondence from Eberlein's files * * * that at the time the selections were made and the patents issued, the officers of the Company in charge of the matter were conscious that the lands were if not actual at least probable oil bearing, and that the selections were made and strenuously urged to

patent for that reason, and not because of their agricultural value."

The Court then proceeds to discuss and quote portions of the correspondence thus referred to, in the effort to support the above conclusion.

In our opinion, this correspondence has been given an importance out of all proportion to its real significance. In fact, in the decision of the lower court it almost entirely displaces discussion of the real issue of the case as to whether the lands sued for were in fact mineral in character and known to be such. Properly considered in the light of the other facts in the case, this correspondence not only does not indicate fraudulent knowledge or purpose, but it proves the very contrary, as we shall point out.

Before taking up the discussion of the lower court's finding regarding this correspondence, we desire to have this Court understand exactly what we consider to be the greatest possible legal bearing these Eberlein letters can have on the real issues of the case. Taken in their most unfavorable light, they can be claimed to show no more than that Eberlein may have *thought* oil might be discovered in the lands for which he was seeking a patent. This would be mere conjecture on his part and not knowledge that the lands actually did contain valuable oil deposits. Nothing short of such knowledge will satisfy the charge of fraud here made. The only permissible use of these letters, therefore,

would be to show a wrongful or fraudulent *purpose* on his part. Whether or not such purpose, if found to have existed, resulted in fraudulent and actionable *damage* to the government, must depend on other evidence in the case concerning the actual character of the land sued for and what was really *known* about it.

In connection with these Eberlein letters one important fact must be noted. These letters, with one exception, were produced by Eberlein from a file he had carefully retained in his possession for a number of years after he left the service of the Railroad Company in 1908. During the San Francisco fire of 1906, these letters were badly charred and burned. Although they were then practically destroyed he had copies made from their charred remains and kept these copies until they were produced in court. There is nothing to show that he did this because of any desire to injure the Railroad Company. On the contrary, he testified that he kept this file for his own "protection". He said that Judge Cornish, his superior officer in charge of land matters, told him to "keep it close for my own protection as well as his own." (Tr. 1279-80). As appears throughout his testimony, he and Judge Cornish were strenuously opposed to having a lease made to the Kern Trading and Oil Company in 1904, covering a large area of actual and possible oil lands, which would otherwise have remained under the dominion of Eberlein himself. His letters

contain a host of arguments against such a lease. It is evident that he intended to defeat this lease at any cost. In fact he never did sign it or consent to it in any way up to the time he resigned in 1908, although he admits that he had known from 1904 that the lease was actually in force and being acted upon by everyone else although unsigned by him. (Tr. 1221)

Guilty men do not ordinarily so carefully preserve the evidence of their own guilt. If these letters do in fact manifest a guilty purpose, Eberlein, who wrote them, must have been aware of it. Then, why should he have so carefully preserved them, and why should he have taken such care to restore them after the 1906 fire? The only explanation consistent with ordinary experience and probability is that he did not think they indicated a fraud on his part. His only thought seems to have been that these letters would be a "protection" to him in case it should be claimed at some time that he had acquiesced without protest in the operation of a lease depriving his department and the Southern Pacific Railroad Company of control over such a large body of lands. He testified that he feared E. H. Harriman might sometime call the matter into question (Tr. 1256)

Eberlein belonged to the New York office of the Railroad Company. In 1903 he was sent to California by W. D. Cornish, who was Vice President of the Southern Pacific Railroad Company and in

charge of its land matters. This was done at the suggestion of E. H. Harriman for the purpose of having Eberlein investigate railroad land matters in California. As already mentioned earlier in this brief, the manner of his appointment and the character of his mission brought him into frequent "collision" with other officers of the Company. (Tr. 1223)

Shortly after his arrival in California, he was made acting land agent of the Southern Pacific Railroad Company by reason of the retirement at that time of Jerome Madden, who had been land agent for a number of years previously. This was in August, 1903.

He at once discharged every employee in Madden's office, except George A. Stone, whom he made his assistant. (Tr. 1188). His attention was early called to the fact that the Company had lost a large amount of indemnity lands because of failure to make prompt selections. (Tr. 1154-5). His attention was also called to the fact that Township 30-23 in the Elk Hills, in which the lands now sued for are situated, had been recently surveyed. "I know I could not understand," he says, "why they hadn't selected it at once. It was always the plan in my time to immediately get after indemnity as soon as it was surveyed." (Tr. 1157-8). There is no doubt he urged this selection vigorously as such was his habit. "Mr. Eberlein," testified Julius Kruttschnitt in this case, "was a nervous, energetic, stren-

uous person; everything he went into, he went into apparently heart and soul as if it were the only thing to be attended to." (Tr. 3090).

On November 14, 1903, he filed his selection list for the lands now in suit. This list was rejected by the local land officers because the lands were within the area which had been withdrawn from agricultural entry by the government in its blanket order of February 28, 1900. (Tr. 1159-60). An appeal was taken by the Railroad Company from this rejection on December 11, 1903. (Tr. 3864).

In connection with this appeal, Eberlein wrote his letter of December 10, 1903, (Tr. 1577) to D. A. Chambers, who was the attorney for the Railroad Company in Washington, D. C. This is the first letter quoted in the opinion of the Court below as an indication of fraud. In this letter, after complaining in his characteristic way because the appeal had been signed by some one in the law department of the company instead of by himself, he says:

> "I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it.
>
> "I have had in mind the suggestion you made some time ago in regard to inducing Mr. E. C. Ryan, Special Agent at Los Angeles, to make his report.
>
> "I am not acquainted with Mr. Ryan, and

it is a matter for serious consideration as to how to approach him.

"It would not do, certainly, to ask for a report recommending the release of the lands selected by us from suspension. In my opinion it would not be politic to ask for a release in any particular district.

"Mr. Ryan would, in all probability, jump at the conclusion that the railroad had some special information in regard to that district, and the result would probably be that our request would have the opposite effect from that desired.

"All that I could do would be in a general way to ask him to submit a report of the lands covered by the order of suspension, which, as you know, embraces a very large area.

"How would it do to ask the Department to suggest to Mr. Ryan that he make a report of so much of the lands within the suspension limits as he has examined up to this time.

"It might be that such a report would cover the very district in which we are operating, and we would then be relieved from the danger of having called particular attention to any locality." (Tr. 1578.)

Mr. Kruttschnitt was then General Manager of the Railroad Company in charge of the operation of its trains. He was also assistant to the President, E. H. Harriman. He testified in this case that he had been directed by Harriman to assist Eberlein in his work generally, but that he had

nothing to do directly with the selection of lands for patent. On being asked if he were specially interested in the lands now sued for, he said: "I was not. My interest was simply and solely to carry out the instructions of my superior officer, the President, to help matters on that Mr. Eberlein was engaged in." (Tr. 3094). He further testified that in 1903 he had no information or belief derived from Eberlein, or from any other source, that the lands in question were or might be oil lands. (Tr. 3083, 3089).

It is probable that Eberlein thus used Kruttschnitt's name merely in order to stir Chambers into more rapid action. The tone of the entire letter indicates that he suspected lack of enthusiastic cooperation on the part of the Company's law department with which Chambers was connected. The letter is singularly frank and open, yet it contains no statement indicating that he then even thought the lands he had selected were *within* the oil territory. All he says is that they *adjoined* the oil territory. This was to a certain extent the fact as they lie from four to ten miles east of the then known oil territory. We have already noted that he was greatly concerned because of the large losses of indemnity lands the Company had already suffered. Possibly and probably he feared that this land, because of the mere fact that it was near an oil district, might be taken up by speculators if the company selections were not promptly approved. In

one of his later letters to be hereafter quoted, he refers to this very danger.

The references in this letter to E. C. Ryan, the government's special agent who later examined these lands, prove beyond question that the acts of Ryan were in no way influenced by the railroad company. In fact, Eberlein quite evidently feared that Ryan would, on general principles, report adversely if he were informed that the railroad company was interested. He and Ryan both testified that no oral or written communication passed between them.

Following the appeal mentioned in this letter, E. C. Ryan was directed by the Commissioner of the General Land Office to examine these lands. He made this examination in January, 1904, and reported that they were not oil lands. (Tr. 1549) As a result, the general withdrawal order of February 28, 1900, was canceled as to these lands and the application of the railroad company was accepted and patent was finally issued on December 12, 1904. In the meantime, as already stated earlier in this brief, the application was duly advertised in a local paper for eight weeks. On September 6, 1904, an amended selection list was filed by Eberlein for the purpose of correcting the description of the base lands in lieu of which a patent for the lands now in suit was asked. This was a mere clerical correction, no change being made in the selected lands themselves. During all this time

there is no evidence that any information had come to Eberlein or anyone else connected with the company to indicate that there was oil in these lands. In fact, no such information could have come as no development had taken place in the lands and no oil had been discovered except that from four to ten miles away, in a different range of hills.

Beginning early in 1903, E. T. Dumble, consulting geologist of the Southern Pacific Company, acting under orders from Julius Kruttschnitt, had been arranging to have the operating department of the railroad company take possession and control of all patented lands then thought to be actual, probable or possible oil lands. Prior to that time, Jerome Madden, who had preceded Eberlein as land agent, had sold large areas of land near Bakersfield for $2.50 an acre, many of which lands later proved to be valuable for oil. On account of this, the operating officials of the company, who wanted the oil for locomotive fuel, decided to take the control of all possible oil territory from the land department, in order to prevent similar sales. (Tr. 3085) Pursuant to this plan, Mr. Kruttschnitt caused the Kern Trading and Oil Company to be organized in May, 1903, to act as the fuel bureau of the Southern Pacific Company. (Tr. 3085). He instructed Dumble to have the lands of the Southern Pacific Railroad Company examined for the purpose of determining what lands should be taken over. Dumble had an examinatior made by his

geological assistants, Josiah Owen and F. M. Anderson, and reported the results to Kruttschnitt in his letter of September 21, 1903. (Ex. 119. Tr. 2912). The map submitted with this letter (Ex. 156) shows the lands which were to be taken near McKittrick. The fact that the lands now sued for were not then patented was, of course, sufficient reason for excluding them from this map, since only patented lands were included in its designations of actual, probable and possible oil lands. But the company did own at that time at least ten other sections of land in the Elk Hills as favorably situated as the lands now in question. (See Ex. 197). None of these were listed by Dumble as being even *possible* oil lands although he was unaware at that time that the lands now sued for were to be selected. In fact, he knew nothing of the selections until late in 1904. (Tr. 2953). His exclusion of these patented lands in the Elk Hills in 1903 clearly indicates that he and his associates did not at that time consider them to be even possible oil lands.

Finally, on April 1, 1904, the Kern Trading and Oil Company took possession of all of the oil properties of the railroad company, including the management of various sub-leases to individual operators. The formal lease of the lands Dumble had designated in his letter of September 21, 1903, was not then completed but was in course of preparation in the law department.

This lease, covering the lands Dumble had designated on his map of September, 1903, was finally completed and signed by C. H. Markham, as Vice President and General Manager of the Southern Pacific Company, and President of the Kern Trading and Oil Company. On August 2, 1904, Markham presented it to Eberlein and asked him to sign it as Land Agent of the Southern Pacific Railroad Company, the lessor. (Tr. 1111). Eberlein refused to do so and the further correspondence, quoted by the Court below as proof of fraud, followed this refusal and the insistence of Markham that the lease should be executed.

The first letter referred to by the learned District Judge in this connection was written by Eberlein to his superior officer, Judge W. D. Cornish, who was in New York. This letter was dated September 3, 1904, and appears in full at page 1075-9 of the record. As it is long, only portions will be here quoted. It begins with a complaint about the Kern Trading and Oil Company. "I am totally in the dark", he says, "as to the objects, rights, etc., of this corporation. I have asked for information several times, but it has never been furnished me."

He then speaks of the proposed lease and says: "This lease was concocted without any reference to me, and it has now been sent over for me to execute on behalf of the Southern Pacific Railroad Company. * * * Inasmuch as the lease is made by the Land Department and the head of

that department is taking responsibility therefor, it does not seem proper that the Southern Pacific Railroad Company shall have nothing to say in regard to the disposition of its royalty oil. * * * As I have already stated, this matter has been hatched for my signature without submission to me and without consultation."

This portion of the letter, which was apparently not noted by the Court below, shows that Eberlein's real reason for refusing to sign the lease was because it had been "concocted" without reference to him and because it would remove such a large body of lands from the control of his department. The letter contains many objections to the lease, generally and as to details, which were obviously added to make his stand as strong as possible.

He seemed to fear that if he signed the lease without formal authority from the directors of his company, his action might be questioned at some later time. "Do you think," he says in this letter to Judge Cornish, "it would be wise and expedient and would it serve the purpose of *protection* if I were to demand action of the Board of Directors of the Southern Pacific Railroad Company ratifying and confirming the lease as it stands, and directing the land agent to sign the lease? (Italics ours.)

We have already noted the fact that when called as a witness in this case he stated that he had carefully preserved this letter and others for his "protection." Undoubtedly he used this word in the

same sense on both occasions. In his testimony in speaking of this very letter he said: "All I wished in that case was that all of these different matters be put forth in the light in which they appeared to me and then let my superior officer take the responsibility. * * * It looked to me like a very serious thing for a man who was less than six months in as complicated a position as that is, and without any information except what he could glean, to take the responsibility for such a lease as that." (Tr. 1238.)

Apparently the operating officials of the Company were quite insistent that the lease should be executed at once, notwithstanding Eberlein's objections, for Eberlein asks Judge Cornish to telegraph him what to do. He assures Cornish that he can prevent immediate action while awaiting reply. This is the portion of the letter quoted by the Court below: "I can stave off the delivery of this document", says Eberlein, "for some time yet, I think, for the reason that if the knowledge of this lease becomes public property it will probably cause us a great deal of trouble in the United States Land Office, and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil bearing."

It is to be noted that he here speaks in terms of conjecture merely. He says that the lands "may *hereafter* turn out to be mineral." He had no knowledge, or even belief, that they were in fact mineral

lands. No such knowledge was then possible in the state of development in that region. He was merely speculating on a remote chance, which was probably far less real to him than was his strong desire to defeat the lease at any cost. This is further shown by the concluding paragraph of the same letter where he says: "If it becomes known that we have executed a lease of lands interspersed with those already under selection by us, and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file upon the lands so selected and that the government will have good ground for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease."

It is apparent from this language that if Eberlein really had any fear concerning the possible effect of this lease on the pending selection list, it was a fear concerning an *appearance* rather than a fact.

He states that speculators might file on the land because of its propinquity to lands leased to the Kern Trading and Oil Company. He seems to have thought that the leased lands were "interspersed" with those he had selected, which was not the fact as they all lay to the southwest of the selected lands.

This was a confidential and intimate letter to his immediate superior, yet he gives no hint that he really thinks the lands are in fact oil lands. On the contrary he calls Judge Cornish's attention to

the fact that the government had examined them and found them not to be oil lands. As he stated in his testimony in this case, what he feared was not any disclosure of *fact* concerning the character of these lands, but that the lease would create a *presumption* which would be false and contrary to the facts as he knew them. He feared that this presumption might be seized upon by the government as an excuse for delaying or denying the patent.

On September 10, 1904, Eberlein wrote a somewhat similar letter to C. H. Markham (Plaintiff's Ex. KK., Tr. 1053-4) In this letter, after objecting at length to the lease upon a variety of grounds, he says:

> "In addition to this there is a very urgent reason for delaying the execution of these papers.
>
> "We have selected a large body of lands interspersed with the lands to be conveyed by this lease, and which we have represented as non-mineral in character.
>
> "Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented.
>
> "We could not successfully resist a mineral filing after we have practically established the mineral character of the land.
>
> "I would suggest delay at least until this matter of patent can be adjusted."

It is evident from this letter also that Eberlein's real desire was to defeat the lease. Again there is no hint that he has any real knowledge or even belief that the selected lands contained oil. What he feared, according to this letter, was that the making of the lease might "*establish* the mineral character of the lands." This meant only that the lease might give them a speculative or presumptive value because of propinquity.

It has already been demonstrated in this brief that at the time these letters were written Eberlein did not have and could not have had any knowledge that the selected lands were oil lands. At most all he could have then possessed would have been a mere conjecture that they *might* turn out to be oil lands at some time. There had been no development of oil closer than four miles from the nearest section of his selection. He had not seen the lands himself and had been assured by his assistant Stone and by the government report on these lands that they were not oil lands. Possibly he had the notion, which is common to many who know nothing about oil, that it might be found nearly anywhere provided the drill went deep enough. But there is nothing in these letters or elsewhere to show that he really thought these lands were in fact oil lands. Yet, these letters were taken by the Court below to indicate a "knowledge and belief" on his part that the statements in his selection affidavits were untrue.

We respectfully submit that this application of these letters was prejudicially erroneous.

The conduct of those who had prepared this lease proved that they were not aware of anything wrong. The lease was arranged for by E. T. Dumble, under the direction of his superior in the operating department, Julius Kruttschnitt. Later, C. H. Markham succeeded Kruttschnitt as General Manager, but Dumble continued to be in active charge of the company's oil interests, present and prospective. His assistants, Owen and Anderson, were in the field examining possible oil lands and reporting to Dumble from time to time.

As Eberlein had no personal knowledge of the lands now in suit and no direct interest in procuring more oil lands it is to be presumed, if there was a fraudulent plan to select these lands for oil purposes, that the suggestions must have come from Dumble or some one in his department. If such a plan existed either he or Kruttschnitt or Markham must have either originated it or learned of it sooner or later. Realizing this the government has sought to show by the uncertain speculations of the aged and decrepit witness Geo. A. Stone that Dumble may have "suggested" to Eberlein that these lands be selected. (Tr. 1029). Both Dumble and Eberlein emphatically deny this (Tr. 2927, 1120, 1136, 1314).

After Eberlein wrote his letter of September 10, 1904, which we have quoted above, Markham and

Dumble still insisted that the lease be executed. Eberlein has testified that Markham was quite insistent that it be signed. (Tr. 1170). Markham sent the Eberlein letter of September 10, 1904, to Dumble, for his consideration, and on September 19, 1904, Dumble replied, stating in effect that Eberlein's objections were unfounded. (Tr. 2950) Dumble testified that he did not remember seeing anything in Mr. Eberlein's letter about the effect of the lease upon the selection list. (Tr. 2951). It is quite possible that he paid no attention to this part of the letter because of the fact that he knew nothing making it of interest or concern to him.

After Markham received Dumble's reply of September 19, 1904, he wrote Eberlein on September 21, 1904, asking him "whether there is anything in the lease that is really objectionable." (Tr. 1061) Other correspondence passed between the two offices, Markham at all times pressing the execution of the lease. Eberlein, as he puts it, was "sparring for time" until he could hear from Judge Cornish. (Tr. 1219). But Cornish never saw fit to interfere, although he knew that the lease had actually been put into operation without Eberlein's signature. (Tr. 1242-5).

If Dumble or Markham or Kruttschnitt had in mind the fraudulent selection of these Elk Hills lands, their conduct was curiously inconsistent. If they were guilty, the Eberlein letter must have in-

stantly put them on their guard. As thinking men, if they were engaged in a fraud, they would at once have taken steps to obviate the danger Eberlein had suggested. They could have done this readily by changing the lease so as to cut out all lands near the Elk Hills, especially as such lands were then and are now undeveloped and of slight prospective value for oil. They also must have known that the mere signing of the lease itself was a matter of slight consequence, as an advertisement to the world of what they believed to be oil lands, compared to their visible acts of operation and control of the leased lands in the field itself. Yet, despite the protests of Eberlein, they proceeded with their operations just as if the lease had been formally executed. (Tr. 2954) Not the slightest change seems to have been made by Dumble and his associates in the course they had already outlined. This is not consistent with the existence of a fraudulent purpose on their part.

The only thing done by Dumble in compliance with Eberlein's desire was the letter he wrote to W. H. Bancroft, who had succeeded C. H. Markham as General Manager, on December 7, 1904. (Tr. 2953). In this letter he said: "In connection with our correspondence regarding the transfer of property to the Kern Trading and Oil Company, I have had a conversation with Mr. Eberlein and it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute the lease

of lands between Southern Pacific Railroad Company and the Kern Trading and Oil Company at present." Dumble testified that he sent this letter after a conversation he had with Eberlein at about the time the letter was written and not on October 6, 1904, as erroneously stated in the opinion of the Court below. He further testified that he wrote it simply out of deference to Eberlein's wishes and not because he thought the matter important. He further explained that the failure to have the lease signed was a matter of utter indifference to him at the time as the Kern Trading and Oil Company was openly operating on the land described in the lease just as if the lease had been signed. (Tr. 2954)

It is quite evident that Kruttschnitt, Markham and Dumble fully understood that Eberlein's real desire was to prevent any lease whatever in order that he might retain the control of the lands covered by the lease. Kruttschnitt testified in this connection: "He knew I had instructions to develop oil on the lands of the Company, and I have never been able to trace his objection to signing the lease to anything except pique because he had not been consulted and he considered himself slighted." (Tr. 3088) Even after he obtained the patent on December 12, 1904, Eberlein continued to refuse to sign the lease or to admit its existence. As late as February 6, 1907, he wrote a letter to the Auditor of the Railroad Company denying knowledge of any

such lease. (See Defts. Ex. 148) (Tr. 2055) At this time he knew that a search was being made for a copy of the old lease following the destruction of the company's records by the fire of 1906. On December 12, 1907, a new lease was drawn up between the Southern Pacific Railroad Company and the Kern Trading and Oil Company. So well was Eberlein's attitude understood at that time that this lease was signed on behalf of *both* companies by E. E. Calvin, who was Vice President of one, and President of the other. (Defts. Ex. 152, Tr. 2961). Eberlein testified that he and Judge Cornish refused to recognize this new lease. (Tr. 1276)

This new lease did not include any of the lands now sued for, although at the time it was executed they had been patented for three years. It included a much larger area than the 1904 lease. In making it up Dumble sent preliminary lists of lands to his field geologists, Owen and Anderson, with instructions to add such lands as they thought proper, no restrictions being placed on them as to where these additions might be. (Tr. 2960, 1614) Owen died before this suit was brought, but Anderson testified that he and Owen worked together and they were at liberty to go where they pleased. (Tr. 2427, 2412-15) He further testified that he did not include the lands now in suit in his 1907 recommendation because at that time he did not consider them oil lands. (Tr. 2728, 2724-9).

If Dumble and his superiors had been aware in 1904 of anything wrong which the execution of the lease of 1904 might have exposed, it is not likely that they would in 1907 make the same sort of a lease covering the same and additional lands. The statute of limitations had not yet run. The truth of the matter is obvious. They had no consciousness of a fraud at any time, and there was no fraud.

We have discussed these Eberlein letters and the incidents relating to them at much greater length than their real importance warrants. Our apology for doing so lies in the fact that these letters were given a meaning and importance by the lower Court out of keeping with their very slight value in determining the real issue in this case.

We have elsewhere discussed the total lack of *knowledge* possessed by Eberlein or anyone else in 1904 concerning possible oil in the land sued for. Unless such knowledge existed there could be no fraud. It therefore makes no difference what Eberlein *thought* or what interpretation is now sought to be put upon his thoughts at that time. Even if he did *think* that these lands might be oil lands, or that deep drilling might disclose oil in some quantity and of some character, this would not afford a single element of fact for the foundation of this suit, nor tend to prove the allegation of the bill that these lands were oil lands and were *known* to be valuable for their oil contents before this patent issued.

We respectfully suggest that the learned District Judge has been misled by these letters into substituting a mere inference of a *belief* in place of the *knowledge* the law requires, which knowledge must be real and must have some reference to the quality and quantity of mineral actually in the lands sued for.

(5) *Finding as to known oil value of the lands sued for.*

The fifth and last finding of fact made by the Court below reads as follows:

> "The only questions upon which I have had any doubt or difficulty is whether the evidence, notwithstanding the matters referred to, is sufficient to show that the patents should be set aside because the lands were in fact known oil lands at the time of the proceedings resulting in their issuance. There had been no actual discovery of oil within the boundaries of the lands at that time, but this was not necessary to determine their oil character. Oil like coal occurs in stratified forms of deposit, or rather migrates into and permeates stratified deposits and follows them persistently and continuously, unless interrupted by some intrusion, to the end."

Then follows a statement that the structure of these lands, "their proximity to and the known extent of oil development and oil sands to the south

and west and extending out and towards the lands in question, the seepages *on or near* the lands and the anticlinal structure thereof, and the then known surrounding conditions" were clearly such as to engender the belief that these lands contained a profitable amount of oil.

This finding involves the only real issue in the case, and should therefore be carefully analyzed. It is first to be noted that the Court admits the existence of real doubt as to its accuracy. Evidently the testimony upon which it was based was not of the "clear and convincing" character demanded by the decisions. If the important and controlling issue of the case is thus left in doubt, the decree should have been for the defendants.

This fifth finding is an obvious attempt to bring this case within the ruling of the Supreme Court in the case of *Diamond Coal Co.* v. *United States*, 233 *U. S.* 236, where it was found that certain land contained coal, although there were no developments on the land itself. But, in that case, the areas in suit were comparatively limited, outcroppings of a coal seam or bed appeared on both sides of the land, and on one side this coal bed had been mined profitably up to within a *few feet* of the land sued for. The Supreme Court in that case did not decide what Judge Bean seems to assume that they did decide, namely, that a showing of mere *belief* of mineral is enough. What they did decide was that the bed of coal had been convincingly shown

to be a *fact* beneath the land sued for. The opinion must be considered in its entirety to appreciate its real meaning. The ultimate conclusion of the Court in that case is thus expressed at pages 247 and 248 of the opinion:

> "We think the evidence, rightly considered, shows with the requisite certainty that at the time of the proceedings in the land office the lands were *known* to be valuable for coal. * * * The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands."

There is nothing in the opinion of the Supreme Court in the Diamond Coal Case to indicate that it was the purpose to change earlier rulings by substituting mere *belief* or speculation as to the existence of minerals for the *fact* of that existence. If the ruling of Judge Bean in this respect is correct, the government would be entitled to cancel a patent to lands upon proof that the applicant, or others, *believed* these lands to be valuable for oil at the date of the patent, even though, at the date of the suit, it had been conclusively demonstrated by drilling that there was not a drop of oil in these lands. In fact, the Court below did make this very ruling as to the lands in the western part of the township sued for, the evidence showing without dispute that numerous deep wells had been drilled in the even

sections on that part of the township without discovering oil. The witness John Lang, an experienced oil man, testified that these were not oil lands. (Tr. 1968) Yet, the District Court finds that they were by its erroneous application of the Diamond Coal case.

If the ruling of the District Court is good law, we have this practical result. The government can have a railroad patent set aside for fraud upon a showing of *belief* that there was oil in the land sued for. Thereupon, if it has in the meantime been discovered that there is no oil in the land, it will be the duty of the government to issue another patent to the railroad company in compliance with the terms of the original grant. The law does not contemplate such a ridiculous situation. The government cannot get the extraordinary relief it here asks unless it has suffered *damage.* If the lands are not *in fact* oil lands there is no damage and the railroad company has gotten no more than it was entitled to. There can be no relief unless a fraudulent representation has actually caused legal damage. (*Southern Development Co.* v. *Silva*, 125 *U. S.* 247.)

In the case of *Iron Silver Mining Co.* v. *Reynolds*, 124 *U. S.* 174, the Supreme Court, in passing upon a problem identical in principle with our own, said:

> "The court below instructed the jury that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with knowledge as prescribed by the statute,

'for, if, in any case, it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein;' and further, that 'that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute.'

"This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact.

"There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The Court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute."

This language is directly applicable to the present case. Mineral quality is a fact. In order to be *known* it must exist. Mere belief, no matter how strong, cannot take its place. The burden is upon the government to prove this mineral character

as a *fact*, not as a mere suspicion or conjecture. All that the Diamond Coal Case holds is that proof of this fact does not require *ocular demonstration* on the land itself.

The Court below in the present case starts off with the assumption that once oil is formed in a stratified formation it will permeate every portion of that stratum "to the end", unless "interrupted by some intrusion". No limit is placed on this supposed migration. It conceivably might extend a hundred miles, if there was no "intrusion". As applied to the present case, it would have to extend many miles, since the lands in suit are from four to ten miles from the nearest oil that was known in 1904.

This initial theoretical assumption of wide diffusion of oil is absolutely necessary if the decree below is to be supported, for there is no proof that oil was known to exist in the Elk Hills in 1904.

But the Court's assumption cannot be supported. It is at variance with all of the evidence of practical and skilled men who have to deal with oil problems. The search for oil is not so simple. No oil man feels justified in drilling a well four to ten miles away from an oil discovery. He would not think for a moment that a discovery of oil on the narrow and limited McKittrick anticline *proved* as a *fact* that there were commercial quantities of oil from four to ten miles away in the Elk Hills, across an intervening valley where the formations carried

water as shown by wells drilled in that direction. The best way to determine what experienced oil men knew and thought is to examine into what they did. The evidence is overwhelming that for years and years they clung to a narrow belt along the main range, from five to fifteen miles away from the Elk Hills. The intervening lands, which must have been of *known* oil value according to the test applied in the present case, were allowed to remain open and unclaimed.

Nor does this test take into account any of the many uncertainties an oil man knows about. There is nothing said about an adequate source for the oil which is to make this long journey; nor about the probabilities of water preventing its migration; nor about the breaking off or alterations of the texture of the strata through which it is supposed to migrate; nor about the possible and even probable absence of sand beds in the Elk Hills, in which the oil could accumulate. These are only a few of the many elements of uncertainty which caused so many witnesses on both sides to refer to the oil business as a "gamble". It certainly has not been shown to be so simple and certain in its problems as the language of the Court below would indicate.

None of the experts for the government venture to say that they knew that there was commercial oil in the Elk Hills. A. C. Veatch, their leading geological expert, admitted that only the drill could determine whether there was commercial oil there;

and further conceded that he did not believe that any oil that might be there could be developed commercially until the remote future. (Tr. 885-9). Dr. J. C. Branner, who is a most eminent geologist, testified merely that the Elk Hills were "suitable for the accumulation of oil", but whether or not oil had accumulated there could be determined only by drilling. (Tr. 1016) Also it is in evidence in this case that in various government geological bulletins concerning the California oil fields, written by Mr. Ralph Arnold, the well-known oil geologist, appears the following statement: *"Any one at all familiar with the conditions and occurrence of petroleum in the California fields knows that any but the most tentative predictions as to the location of oil are extremely hazardous."* (Tr. 926).

This evidence, as well as a great mass of evidence from practical oil men, pointing out the risks and uncertainties of oil prospecting, was overlooked or disregarded by the learned District Judge. If, as Mr. Arnold says, the prediction of oil in new territory is "extremely hazardous", there is very slight foundation for this finding of the Court below that oil was *known* to exist in the Elk Hills in 1904.

This finding was based on nothing more substantial than speculative conjecture. Oil is not like coal, for the latter stays where nature first put it, and the exposure of a coal bed at one place is strong evidence that the same bed will be found to extend at least a short distance away. But it is not proba-

ble that, even with coal, the Supreme Court would carry the application of its ruling in the Diamond Coal case for a distance of from four to ten miles as is sought to be done here.

The Supreme Court carefully guards against such an application of its opinion. It must have had in mind the peculiar and unusual situation it had to consider in that case. At the end of its opinion it says: "It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular and otherwise unlike coal as to require that they be dealt with along other lines." In the present case there was nothing pointing "persuasively" or otherwise to the *quality*, *extent*, or *value* of any oil in the Elk Hills. Justice Van Devanter, who wrote the opinion in the Diamond Coal case, fully understood that the occurrence of oil is "irregular and otherwise unlike coal." In the case of *Brewster* v. *Lanyon Zinc Co.*, (C. C. A.) 140 *Federal*, 801, 806, in speaking of an oil field in Kansas, he says: "The field was practically undeveloped and its extent was unknown. Experience in other oil and gas fields had demonstrated that wells drilled in the vicinity of producing wells were not infrequently unproductive. The only method of certainly determining whether or not particular lands contained oil or gas in paying

quantity was by drilling thereon to considerable depth."

This uncertainty in the occurrence of oil has received judicial recognition in this circuit. In the case of *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 *Fed.* 673, 675, Circuit Judge Ross, in speaking of a claim of discovery of oil on an undeveloped tract adjoining another tract in the Coalinga oil district in which there were producing wells, said: "There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. * * * * Indication of the existence of a thing is not the thing itself."

VIII.

The Government officials themselves are of the opinion that the lands in suit are not commercial oil lands and are not suitable for a naval reserve.

It is a matter of judicial notice, as well as in evidence in this case, that in 1912 a large area in the Elk Hills, including the lands in suit, was by

executive order established as "Naval Petroleum Reserve No. 1", to supply fuel oil for the Navy. Later, it was concluded by the United States Geological Survey that this Reserve No. 1 was not as promising as they had thought. Thereupon, Reserve No. 2 was recommended and established in the productive Buena Vista and Midway region.

Contests at once arose with oil locators on Reserve No. 2 and remedial legislation was sought in Congress to assist these locators, which legislation was opposed by the Navy Department to which branch of the government these reserved lands had been thus assigned. The oil locators on Reserve No. 2 raised the claim that the Navy should be satisfied with Reserve No. 1 in the Elk Hills. The Secretary of the Navy and his subordinates contended, on the contrary, that Reserve No. 1 was of practically no value.

While House Resolution 406 was under consideration by the Senate Committee on Public Lands, an amendment was offered to the bill which was intended to give the locators in Reserve No. 2 some of the relief they asked. A public hearing was had by this committee. (See "*Hearings before the Committee on Public Lands, United States Senate, Sixty-fourth Congress, first Session, on H. R.* 406, '*An Act to authorize Exploration for and disposition of coal, phosphate, oil, etc.*'— *Govt. Printing Office,* 1916.)

At this hearing Secretary of the Navy Daniels appeared, on Feb. 2, 1916, in opposition to the amendment and said in regard to Reserve No. 1:

> "I am not familiar with all those details, and I am going to ask Mr. Landis and Mr. Latham, who have both been upon that land, to give you all the information they have, when I have completed my statement. (p. 210) * * * I have here this morning a geologist and petroleum expert, Mr. Latham, and also Lieut. Commander Landis, of the Navy. These gentlemen have been on these lands and have made a study of them. (p. 220) * * * * I would like to have the committee hear Mr. Latham and Mr. Landis." (p. 221)

Thereupon Lieutenant Landis, who was the Naval Officer in charge of these reserves, was called and made the following statement: (p. 227)

> "The value of Reserve No. 1 is uncertain. Only three wells have reached the oil sand. Their production is uncertain and has been variously estimated at from 40 to 100 barrels a day of a good grade of oil. The field has not been sufficiently developed to enable anyone to accurately estimate its value as a naval reserve. Reports of geologists, opinions of oil men of experience, and all the information available on the subject justify the belief that there is oil in this reserve, but it is known that it is at a great depth, probably 4000 feet or more, and it is not expected that the production even at that depth will be great. It is doubtful if the wells there will prove of com-

mercial value, and it is certain that they could not be operated at profit at the prevailing price of oil. In this field there is no proven land at that portion of it; that which may be said to be partly proven amounts to 2,310 acres, 1440 of which is patented to the Southern Pacific Railroad Co., and has been won by the Government in what is known as the Elk Hills Case. The Navy cannot depend on this reserve for its oil supply."

Mr. E. B. Latham, the geologist and petroleum expert mentioned by Secretary Daniels, was thereafter called and said: (p. 239-40)

"I was shown an opinion as to the suitability of the Naval Reserve. This opinion had been made up, and I agreed with it, and I was asked by the Navy Department to state my agreement to this committee. If you care to ask me any questions as to my reasons, I will be very glad to answer them."

Senator Works. "What statement or opinion do you refer to?"

Mr. Latham. "Well, it is in substance what has been given you by Mr. Payne and Mr. Landis. * * * * I will state it very briefly. In my opinion Reserve No. 2 is enentirely suitable for that purpose. Unless the Southern Pacific Lands are lost to the government a reserve can be maintained there in spite of any seepage or depletion of the wells drilled by the parties. In my opinion Reserve No. 1 is not suitable for a reserve. I do not think that the Navy Department should depend upon

that. I do not think it is commercial oil land at all and I think it is very limited in its content of oil."

Senator Works. "To what extent has that field been tested?"

Mr. Latham. "Why to quite an extent. There were wells drilled almost from one end of the Elk Hills to the other, scattering, and many of them quite deep. One well drilled by Mr. Kinsey went nearly a mile deep without finding any oil whatsoever. * * * * There are some sections, of course, where oil is known to be present. Whether it is there in commercial quantities may be very seriously questioned in my opinion."

Conclusion.

If the judgment canceling the patent in this case is to stand, it means that any United States patent conveying land may, years after its issuance, be canceled merely on proof that at the time of its issuance there was an oil well in existence from four to ten miles distant from the land at the time patent was issued, supported by no other evidence than the opinions of two geologists that at the time the patent issued an expert geologist would have known that there was oil in the land, who also both testified that the extent and depth of such oil could not be known, and one of whom expressly admitted that, in his opinion, such oil could not have been mined

at a profit at the time patent issued, nor within any definite period thereafter.

If the judgment in this case is to stand, it means also that a United States patent may be canceled, not only upon evidence of the character above mentioned, but also in the face of the uncontradicted evidence that all developments upon the intervening sections of land, subsequent to the issuance of such patent, have demonstrated that there is no oil whatever in the lands in suit, except in so far as it may have been shown by three wells drilled on three sections at the easterly end of the tract in suit, in none of which was oil found in sufficient quantities to meet the cost of production.

If the judgment in this case is to stand, it means, in short, that no title to patented land is secure if a geologist can be found, at any time after the issuance of patent, to express the opinion that other geologists should have known that, at the time the patent issued, the land contained oil, even though it is in the same breath conceded that no human being could tell, at that time, or even at the time the case is tried, whether the oil was where it could be reached, and the testimony of such geologist, even as to the possibility of oil being found in substantial quantity in the land is contradicted by other geologists, equally competent, who were much more familiar with the land, and whose testimony is corroborated by subsequent events.

Appellants confidently submit that the property cannot be taken away from those in whom the legal title is vested by the solemn act of the government itself upon any such testimony as that relied upon by the government in this case.

Appellants believe that a United States patent for land, is still, as it always has been, "something upon which its holder can rely in peace and security in its possession"; that "in its potency it is iron clad against all mere speculative inferences" (*Eureka Case*, 4 *Sawyer* 302); that it cannot be canceled except on testimony "clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." (*Maxwell Land Grant Case*, 121 *U. S.* 325; *U. S.* v. *Iron Silver Mining Co.*, 128 *U. S.* 673; *Colorado Coal Co.* v. *U. S.*, 123 *U. S.* 307; *Salone* v. *U. S.*, 164 *U. S.* 255; *U. S.* v. *Stinson*, 197 *U. S.* 200; *Diamond Coal Co.* v. *U. S.*, 233 U. S. 236)

The words of Mr. Justice Miller in characterizing the case made by the government in *United States* v. *San Jacinto Tin Company*, 125 U. S. 273, 300, so fitly describe the present case that we may adopt them as our own summary thereof. "So far," he says, "from there being the satisfactory evidence here pointed out of a fraud against the government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as 'fraud', 'deceit' and 'imposition'. If the case stood alone upon the testimony

introduced by the government it would, so far as any fraudulent purpose is concerned, do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the government, and not always by the most appropriate means; but when the testimony for the defense is considered it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes."

It is respectfully submitted that the judgment should be reversed with directions to enter judgment for defendants.

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